

THE
DOCTRINE OF CONSIDERATION

TREATED

HISTORICALLY AND COMPARATIVELY

(TREATISE APPROVED FOR THE DEGREE OF DOCTOR OF LAWS IN THE UNIVERSITY OF LONDON)

BY

686

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To the Honourable
SIR BASIL SCOTT, KT., M.A. (OXON.)
CHIEF JUSTICE
OF
THE HIGH COURT OF JUDICATURE AT BOMBAY

A MAN COURTEOUS AND ACCOMPLISHED

A JUDGE WISE AND ABLE

THIS TREATISE

IS, BY PERMISSION,

MOST RESPECTFULLY DEDICATED.

FOREWORD.

IT gives me great pleasure to introduce this book in a few words of recommendation. The subject is one of unusual interest. There is probably no other legal topic, except perhaps Negligence, which lends itself so kindly to scholarly and philosophic treatment. The professional Advocate may lay aside Dr. Daruvala's book with a sigh and a sneer declaring it to be altogether unpractical and of no use for the immediate purposes of forensic argument; but the jurist, the student of comparative law, the philosophic analyst of legal notions, will accord it a warm welcome, and find in its crowded pages remarkable treasures of out-of-the-way knowledge, a very fascinating and complete exposition of the origin and growth of our present Doctrine of Consideration, conscientiously worked out in the light of history and comparative jurisprudence. It is not, I think, too much to say that the subject has never yet been so thoroughly exhausted. In England the development of the Doctrine of Consideration, rooted perhaps in the early Roman law, was so characteristically organic, so intimately bound up with the life of the times, always rather genetic than consciously telic, that a review of its progress from archaic simplicity, through many legal fictions and formulary actions to its final nice complexity, shows along its whole course in quaint pictures and side lights, the general, national and social processes with which it so accurately corresponds. All the curious learning collected in these pages upon the history of Consideration in the English law, displays *in petto* picture after picture of the actual life of the times, the vivid setting in country fair or town of the conditions appropriate to the national

evolution, for purely legal purposes, of this ancient doctrine. The author appears to have fallen in love with his subject, as every true scholar, who wants to do good work should. On its comparative side, I should think that the book was unique. Every existing and many extinct systems of law have been laid under contribution. We have Consideration in the Roman, the Dutch, the Scotch, the Teutonic law ; that was to be expected. But Dr. Daruvala is nothing if not thorough. He proceeds to include in his comparative study, the Chinese, Japanese, Babylonian, and half a hundred other bodies of law, ancient and modern. I have not had time, I probably never shall have time, to read the whole book critically, but wherever I have dipped into it I have found matter of interest and instruction. It is unlikely that the work will become a popular handbook, but it ought to be welcomed by the more earnest students and practitioners of the law as a mine of valuable and rare information, to which recourse can always be had for clearing up and the better understanding of any point arising under this wide head of law.

F. C. O. BEAMAN,
ONE OF THE JUSTICES,
High Court, Bombay.

PREFACE.

The Doctrine of Consideration is peculiar to English laws. Like all laws based on particular systems, it requires a certain knowledge of the principles and habits of thought which are associated with that doctrine. The writer of this thesis has given some exposition of those fundamental ideas in the Common Law which are part and parcel of this doctrine.

The doctrine is treated from the Historical and Comparative point of view. In the first two chapters the general and early legal history of the doctrine is given, with special reference to English law. There has been a gradual development of the Doctrine of Consideration from the middle of the 15th century, and it is an integral part of Forms of Action from which it emerges. The study of the form of personal actions shows that the doctrine was very largely the product of forms of pleading.

Various theories which have been advanced about this doctrine are discussed and explained in the light of legal history. This doctrine was the direct result of the *Writ Consimili Casu* and the struggle for supremacy between Common Law and the Chancery Courts. The doctrine was of procedural origin and was greatly assisted in its growth by the economic condition of England. The aim of the writer in the words of J. R. Green, "is to show the incidents of that constitutional, intellectual and social advance in which we read the history of the nation itself." It is with this purpose that much space is given to decided cases, because the peculiarity of English law is that precedents are regarded with much respect and judges gradually expand the scope of remedies while keeping within the bounds of the written law.

Chapter III is devoted to the critical study of the present Group A. Doctrine of Consideration. The chapter is divided into three main sections, with rules framed for the study of the

doctrine as it is practised. The writer has preferred to pass lightly and briefly over the details of the doctrine to dwell at length on the practical application of the rules. .

The study of the Comparative Doctrine is divided into three main groups.

The English Doctrine of Consideration is accepted in British India, some colonies of Great Britain and in the United States of America. The writer has compared the existing English Doctrine of Consideration with the doctrine as it is accepted in these countries, and for this purpose each chapter is divided into three parts pointing out the differences that are embodied in the legal doctrine of the various countries.

Group B.

In Chapter VII the English doctrine is compared with the doctrine of *causa* in Roman law. .

In Chapter VIII comparison is made between the English doctrine and that of Roman-Dutch law, and there is a discussion of the present controversy about the texts of the Dutch jurists on this doctrine.

Chapter IX is devoted to the statement of the Roman-Dutch doctrine as accepted in some of the British Colonies.

Chapter X gives a comparison of the doctrine in English and Scotch law.

In Chapter XI comparison is made between the Doctrine of Consideration and that of Cause as it obtains in the countries of France, Belgium, Italy, Portugal, Spain, the Argentine Republic, Colombia, Uruguay, Costa Rica and the Republic of Chili.

In Chapter XII a comparison of the Doctrine of Consideration is made with that of Cause in the law of Lower Canada, Malta, St. Lucia and several other possessions of Great Britain in which the French doctrine is accepted but where English law is gradually being introduced by means of the statutes of local legislature.

Group C.

In Chapters XIII to XIX there is no Doctrine of Consideration in the English sense of the term, nor any Doctrine of Cause in the French sense of the term to make a contract

binding. Offer and acceptance are the only necessary elements required by law to create liability between the contracting parties.

In Chapter XIII a comparison of the doctrine in English and German law is given.

In Chapter XIV a comparison of the doctrine in English and Japanese law is made.

Chapter XV contains a comparative view of the doctrine in English and Austrian law.

Chapter XVI deals with comparison of the doctrine in English and Russian law.

In Chapter XVII comparison is made of the doctrine in English and Chinese law.

Chapter XVIII contains a comparative view of the doctrine in English and Babylonian law.

Chapter XIX contains a comparison of the doctrine in English, Jewish and Ottoman law.

Chapter XX contains a summary of the whole.

The law of Mexico is based on the French Civil Code, hence it belongs to Group B. (There must be, in addition to Offer and Acceptance, a cause to make a promise binding). It has not appeared necessary to give Mexico detailed treatment, but the works consulted are appended.¹

The Civil Code of Bulgaria is based on the Ottoman Code.

The Serbs are a Slavonic nation. A Code was published in 1343 A. D. by Tzar Dousba. The legal Code of Stephen Doushan, Tzar of the Serbs, was published in 1898.²

¹ *Civil Code of Mexico*, 1884 : Hamilton's *Mexican Law*, 1884 ; Bancroft, *History of Mexico*, 1883 ; Percy F. Martin, *Mexico of the Twentieth Century*, 2 Vols., London, 1907 ; *The Civil Code of the*

Mexican Federal District and Territories, by J. P. Taylor, 1904.

² *History of Modern Servia*, London, 1872 ; *Encyclopædia Britannica*, "Servia".

The Kingdom of Bohemia has Slavonic law and belongs to the group of Slavonic nations.¹

Poland is inhabited by Slavs.²

These states have a doctrine very similar to that which obtains in Russian law and it is of Slavonic origin.

The Federal Civil Code of Switzerland was promulgated in 1807 and came into force 1st January, 1912. That Code is based on the German Civil Code. There is a Federal Law of Obligation, 1881, which is modified by cantonal articles.³

Denmark⁴ has a Civil Code of 1683. This Code was promulgated by Christian V. (1670-1699 A. D.)

Norway has a Civil Code of 1687.

Sweden has a Civil Code of 1734, a Commercial and Maritime Code of 1734.

Hungary has no Civil Code. The law XXXVII, of 1878, all deals with the Commercial Code. The law XXVII, of 1876, deals with Bills of Exchange.

In these countries offer and acceptance are the only necessary elements to make a contract binding; neither valuable consideration, as in English law, nor cause as in French law, is required for the validity of a contract. There is no idea of trust and an instrument in the nature of a deed is not known. The creditors have a perfect right to set aside gifts of property if their claims are prejudiced. The writer, to avoid repetition, has not treated the law separately.

¹ *A History of the Balkans*, by William Miller, 1896; *The Shades of the Balkans*, by Pencho Slaveikov, Bernard and Dillon, 1904; *General History of Bohemian Law*, by Prof. Tchaikovsky, 2nd ed., 1900; Dr. Count Lutzow, *Bohemia*, Prague, 1911.

² Josef Szujski's *History of Poland according to Latest Investigations*, 1865-66; *Encyclopaedia Britannica*, 'Poland.' Lectures on

Slavonic Law, by Feodor Sigel, Ilchester Lectures, 1902.

³ *Commentary on the Code Civil*, by Virgile Rossel; Switzerland; *Civil Code*, 1907, by Prof. Eugen Huber, *System und Geschichte der Schweizerische*.

⁴ Denmark *Riges Historie*, (Copenhagen), 1897-1905; *Norway and Union with Sweden*, by Nansen, 1905.

These states belong to Group C, where offer and acceptance alone are requisite to make the promise binding.

The systems selected for comparison are typical and represent the different views which have been entertained about this doctrine, both in modern and ancient systems of law. The object is to exhibit the standpoint of jurists in framing their systems with reference to the Doctrine of Consideration.

Freeman writes : " Our studies of the past may be found to have, after all, their use in the living present, that we may at least not play our part the worse in the public life of our own day, if we carry about us a clear knowledge of those earlier forms of public life out of which our own has grown. We shall surely not be the less at home in our own generation if we bear in mind we are the heirs and scholars of the generations that went before us, if we now and then stop in our course to thank the memory of those without whom our own course could not have been run ."¹

The above remarks apply very clearly to the study of our doctrine from an historical and comparative point of view, and the writer's debt of gratitude is immense to those masters whose works have been consulted.

An Appendix is given showing the comparative position of the rules in different countries.

Very heartfelt thanks are due to the Librarians of the Bodleian and of All Souls' College, Oxford, to the Director of the British Museum and the Benchers and Librarian of the Inner Temple and Middle Temple and Bar Library for their kindness in allowing the writer of this thesis to consult books in their libraries ; and also to the Benchers and the Librarian of Lincoln's Inn Library for having given facilities to use the library during the long vacation.

The writer is under obligation also to the Embassies, among others, of Italy, Japan, China and the United States of America for the readiness and sympathy in supplying information relating to the legal systems of those States.

¹*The Method of Historical Studies*, p. 40.

He expresses his deep debt of gratitude to various learned gentlemen for referring him to the original sources which are appended to the various chapters and to all those writers whose works have been consulted.

The writer should not close this Preface without an expression of thanks to friends and well-wishers who, from time to time, have helped him. The writer can hardly express himself adequately. It is owing to the encouragement he received from his dear uncle, Sir Shapoorji B. Broacha, Knight, that he decided to have his manuscript copy in print at the recommendation of the examiners at the University of London. He has evinced keen interest in the studies of the writer, and his noble life has all along been a source of inspiration and encouragement to his nephew. Sir Basil Scott, Chief Justice, High Court of Judicature, laid the writer under a deep debt of gratitude by encouraging him in graciously giving leave to dedicate the book to His Lordship and in taking keen interest in the scientific study of law. Sir D. D. Davar, Acting Chief Justice, has been pleased to read the book and to offer suggestions to enhance its utility from the practitioner's point of view. Mr. Justice Beaman has evinced interest in the subject of comparative Jurisprudence, and the writer feels extremely grateful to His Lordship for the contribution of a Foreword to the book. Sir S. L. Batchelor, Justice, has with great kindness read the book during the vacation and been good enough to suggest improvement in foreign words and phrases. Mr. Justice Heaton, Vice-Chancellor of the University of Bombay, has been very keen to foster advanced legal studies and has taken the trouble to look over proofs as they have been printed and has evinced much interest in the book, and has been very sympathetic and courteous to the writer.

HIGH COURT LIBRARY, }
Bombay, June 1914. }

P. N. D.

INTRODUCTION.

The Doctrine of Consideration, in the sense in which it is known, in English law, dates from the middle of the fifteenth century. But the roots of this doctrine are to be traced in the remote past. Maine writes: "The positive duty resulting from one man's reliance on the word of another is among the slowest conquests of advancing civilisation. Neither *Ancient Law* nor any other source of evidence discloses to us society entirely destitute of the conception of contract. But the conception when it shows itself is obviously rudimentary. At first nothing is seen like the interposition of law to compel the performance of a promise. That which the law arms with its sanctions is not a promise but a promise accompanied with a solemn ceremonial."¹

The Doctrine of Consideration shows that society had much advanced and that law had given its sanction to the promise.

The writer of this thesis has examined the legal systems of civilised countries and traced that fundamental idea of the doctrine in them. The study of different systems of law clearly shows the great resemblances in thought. There is uniformity in spite of different modes of expression of that doctrine. Where commerce has been practised on a large scale, this idea has been very clearly embodied in the legal system; where the life of the people has been very simple, that idea is absent or faintly conceived.

Institutions are like the organic world in that they obey the law of evolution and are gradually transformed. Under the action of this law, as society develops, everything that is not in harmony with the environment tends to disappear. But the process is slow, owing to what is known as the law of persistence, the past is not dead but living and thoughts

¹ *Ancient Law*, p. 313.

and actions of our forefathers continue to rule our conduct. Human nature is conservative, for in Jurisprudence there are survivals and even the most advanced legal system contains forms, the origin of which is forgotten. The reason for a rule may have vanished but the rule is still observed from blind imitation ; there are many errors in the doctrine which may be traced to clever and idle attempts to justify rules which were due to historical accidents. Holmes says all law is a compromise between the past and the present.

Mere logical analysis will not give us a true interpretation of the legal doctrines, for law is not modelled on rules of logic, but has gradually grown with the growth of society ; and even the most familiar legal conception of our day is only the last term of a long and complicated series having its roots in the dim and misty past.¹

Without some knowledge of legal history we cannot know the precise scope of the rules which have been bequeathed to us from former days. Law and History are twins, their union has produced wonderful results. Institutions are not lifeless things, and it is absurd to study them as inanimate objects ; they are continually growing. The utility of history is seen in the moral and economic progress of nations. The applied sciences of geology and physiology show us the successive phases of development, and there is a continuity from the past to the present. In this spirit the historical school of Jurisprudence has illumined the Doctrine of Consideration.²

Maine says Comparative Jurisprudence has for its objects the throwing of light upon the history of law for the enlightening of philosophy. Comparative Jurisprudence takes the legal systems of two distinct societies under one head of law and compares those chapters of the systems under that head. It takes the heads of law, which it is examining, at any point of their historical development and does not affect to discuss their history, to which it is put into order our knowledge of the phenomena of nature.

¹ *Common Law*, pp. 34, 35.

² *Village Communities* p. 5.

Such a study borders on political economy; part of its material has been fashioned by judicial doctrine and practical law. The sources of information are abundant. There are legal and fiscal documents to enlighten us. Similar processes on the Continent require similar methods of study.

The Doctrine of Consideration has been economic, social and political. It has not been devised or arranged by any one individual, but slowly evolved by the needs of generations. There is a great affinity between the English, Doctrine of Consideration, the French *Causa* and the German *Oorzaak*. A careful study of any one of them helps to a clear understanding of the others, and one of the powerful means of checking the theories as to the growth of the three consists in applying these theories with due allowance for difference in circumstances.

There are four methods, writes Bryce,¹ which can be employed in the study of this doctrine. They are (1) the metaphysical, (2) the analytic, (3) the historical, and (4) the comparative methods.

(1) The metaphysical method is pursued in finding out the categories of the subject with special reference to ethics or psychology. German jurists have treated the doctrine from an abstract point of view. They try to satisfy the desire for unity which exists in the mind of man. They treat of Jurisprudence as dealing with facts, or groups of facts, which produce juristic effects. In the place of a series of legal rules they furnish us with abstract conceptions, partly of law and partly of fact. Each conception, once gained, urges us to rise to still higher ones and this ideal begets a desire for a system of law.²

(2) The analytic method starts from actual facts as they are to be seen to-day. That method is employed by Austin and Bentham. The foundation of the legal system is utility. The theory of utility is useful to legislators but not to jurists.

¹Studies in Jurisprudence and
Legal history, Vol. II, p. 19.

²Sohn's *Institutes*, p. 15.

(3) The historical method is employed to find out how law originated. It sees in law a product of time, the germ of which exists in the nature of man as a being made for society, who gradually develops according to his environment. Law tends, as it grows, to be closely associated with the State as one of its functions. This method is very useful to explain ideas which cannot be explained by any abstract or logical analogies, because those ideas are the result of the special conditions of the country or people where they originate. All law is a compromise between past and present tradition and convenience; the historical method takes no notice of accidental points due to the peculiarities of individual law-givers. It fixes its attention on national character and the circumstances of national growth. It looks to the tendencies of each nation and not to those of each individual. This method brings to light the fact that ideas and rules which prevail at any given period of history may not be useful for a later generation with a different environment. In the science of law this method applies more to the law of particular countries than to the theory of law in general. Rudolf von Ihering has treated the subject from this standpoint.

(4) The comparative method examines the doctrine in every legal system, studies their points of resemblance and difference and constructs a system which embodies their essential features. This method rests on knowledge of history.

The method of the Civil Law tribunal, says Gray, is more deductive than that of the Common Law court. The jurist works by induction. His general doctrines are not perceived by him intuitively and a judge who is working with precedents in the form of earlier cases is slow to accept any general doctrine or to lay down any rule as final. Each new fact brings a new element into the law and the old results are to be reconsidered in view of this new element. The Common Law judge is like an experimenter in chemistry, who is always testing his theory by new and varied experiments, but who perhaps

is not ready enough to admit that the record of former experiments may be wrong; while the Civil Law is like a chemist, who, having arrived at a theory, insists upon applying it as the true rule of nature.¹

This essay is intended to further the study of English law from a comparative point of view and to expound the Doctrine of Consideration, not only in the English but in foreign systems of law; to suggest ideas for the removal of absurd and technical rules which seriously hamper the study of the doctrine. When there is frequent intercourse between civilised nations, it is the duty of the jurists of every country not to be satisfied with a knowledge of one system of law, but to study the legal systems of foreign countries and thus facilitate commerce. It is not possible to obtain a thorough grasp of the principles of this doctrine unless law is regarded as an organic whole; each system of law must be studied with reference to its origin and growth. A comparative legal study is most fitted to effect that end.

The study of this Doctrine of Consideration shows that there are rules in the English doctrine which are quite accidental and can be removed if the subject is investigated from the comparative point of view. That comparison teaches us that rules which are to be found in one system are partly natural and partly accidental and peculiar to that law alone.

Savigny said the practitioner, amid his occupations, ought always to keep a firm hold of the science of law and should never forget that science rightly apprehended is only the generalisation of rules which it is his function to make known and apply in detail. Law studied and practised in this spirit is as fascinating to the student and practitioner as it is beneficial to the people at large. To the practitioner, the grasp of legal principles is of greater value than knowledge of particular rules.

Bryce says—"The more any department of law lies within the domain of economic interest, the more do

¹*Nature and Sources of Law*, p. 256.

the rules that belong to it tend to become the same in all countries; for in the domain of economic interest reason and science have full play. But the more the element of human emotion enters any department of law, the greater becomes the probability that existing divergencies between the laws of different countries may in that department continue."¹ Reason and science have full play because the Doctrine of Consideration lies within the domain of economic interest. Hence the plea for the unification of law for the well-being of commerce in its international relations is very powerful.

¹*Studies*, Vol. I, p. 144.

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ERRATA.

CHAPTER I.

- Page 5—*Read specialty for speciality* in line 9.
" 26— " *briefly for brifly* in line 14.
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CHAPTER II.

- Page 29—*Read Glanville for Galnville* in foot-note.
" 35— " *quid pro quo for qud pro quito* in line 17.
" 39— " *bring for being* in line 26.
" 39—*Omit 'it'* in line 32.
" 41—*Read year for yea* in line 1.
" 42— " *Acceptilateo for Acceptilatic* in line 3.
" 43— " *Pleas for please* in note 1.
" — " *of English for of nglish* in note 3.
" 48— " *select for sleet* in note 2.
" 52— " *or for are* in line 9.
" 52— " *consimili for consimile* in line 35.
" 52— " *commentaries for commentarice* in note 1.
" 55—*Insert 3 East 597* in note 1.
" 56—*Read Mather for Hather* in note 1.
" 57— " *American for America* in note 1.
" 60— " *vi et armis for viet armis* in line 9.
" 63— " *46 Ed. III 15 for 46 Ed. III* in line 13.
" 77— " *1590 for 1890* in line 23.
" 82— " *p. for pl.* in note 1.
" — " *postea for post ea* in line 8.
" 89— " *quid for qui* in line 35.
" 90— " *fidei for fideo* in line 23.
" 98— " *Student for Stueent* in line 21.
" 99— " *Sharrington for Sharington* in line 1.
" 99— " *Bacon for Becon* in line 36.
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CHAPTER III.

- Page 125—*Read fraudulent for fradulent* in line 7.
" 132— " *the for he* in line 37.
" 133— " *Raym for Reym* in note 1.

- Page 140—*Read* stranger *for* strengre in line 3.
 „ 142— „ 1908 *for* 908 in note 2.
 „ 151— „ Leake's *for* Leak's in line 12.
 „ 158— „ Basis *for* bais in line 36.
 „ 162— „ Failure *for* Faure in margin.
 „ 162— „ p. 9 *for* p. in note 2.
 „ 166— „ accord, *for* accords in line 30
 „ 168—*Insert* 4 in line 36.
 „ 170—*Read* 1882 *for* 882 in note 3.
 „ 187— „ Muggridge *for* Muggeride in line 34.
 „ 188—*Omit* 5 in line 37.
 „ 195—*Read* specialty *for* speciality in line 11.
 „ 197— „ 1 Ch. D 33 *for* 1 ch 33 D. in note 5.
 „ ——— „ est *for* east in line 9.
 „ 201— „ parte *for* parie in note 4.
 „ ——— „ cesti *for* cestui in line 11.
 „ 203—*Add* on Trusts in note 5.
 „ 204—*Insert* 4 in note 4.
 „ 208— „ In in note 3.
 „ 209—*Read* 1742 *for* 742 in note 2.
 „ 211— „ sale *for* safe in line 21.

 CHAPTER IV.

- Page 218—*Read* Waqf *for* Waq in line 23.
 „ ——— „ Damduput *for* Damdupu in note 2.
 „ 223—*Omit* Indian in note.
 „ 226—*Read* I.L.R. *for* I.L.H.R. in note 1.
 „ 227— „ Hob. *for* Nob in line. 37.
 „ 232—*Insert* are held in note 2.
 „ 233—*Read* Willes *for* Willies in line 5.
 „ 240—*Omit* 57 in note 2.
 „ 244—*Read* Haribhai *for* Haribai in note 2.
 „ 249— „ Conolly *for* Coholly in note 1.
 „ 262— „ request *for* requet in line 23.
 „ 268— „ Markby *for* Markley in line 33.
 „ 269—*Insert* (1) in line 21.
 „ 275—*Read* Fraudulent *for* Fradulent in line 10.
 „ ——— „ fraudulént *for* fradulent in line 19.
 „ ——— „ purchaser *for* purchascr in line 25.
 „ ——— „ West J. *for* Westg in note 3.
 „ 278— „ Forthergill *for* Fother Gill in note 1.
 „ 279— „ possession *for* possessions in line 24.

CHAPTER VI.

- Page 322—*Read* Property *for* Propert in note 5.
„ 334— „ Langdell *for* Langdel in line 26.
„ 343— „ specialty *for* speciality in line 25.
„ 349— „ Bilateral *for* Bilatoral in line 17.
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CHAPTER VII.

- Page 369—*Insert* ' 2 ' in note 2.
„ 374—*Read* negotiability *for* egotiability in line 14.
„ 378— „ Vangerow *for* Vangerew in note 4.
„ 379— „ refers *for* refer in line 31.
„ 381— „ largely *for* largey in line 12.
„ 382— „ vitiate *for* vititate in line 7.
„ 390— „ lost *for* lot in line 19.
-

CHAPTER VIII.

- Page 398—*Read* Commentary *for* Comment in note 2.
„ 418—*Insert* 28 S. A. L. J. 127 in note 5.
„ 420—*Raleigh v Josmins, see* 26 S. A. Law Journal, 115.
„ 421—*Read* apply *for* appl in line 4.
„ 429— „ redhitoria *for* dedhitoria in line 34.
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CHAPTER XI.

- Page 505—*Read* Other States *for* Other State in margin.
„ 506— „ Annotated *for* Annottel in note 2.
-

CHAPTER XIII.

- Page 558—*Read* domini *for* do noini in line 2.

CHAPTER I.

GENERAL LEGAL HISTORY OF THE DOCTRINE OF CONSIDERATION.

Before the Norman Conquest there was no secular law of Contract. Actual delivery was the only mode of transfer between living persons. Acceptance of earnest-money and the giving of faith and pledges were the customary means of binding a bargain and contracts in writing were not in use. Promises were made by oath, and the Church was powerful to enforce such promises¹. Before the Norman Conquest Society was simple.

Trade was in its infancy, internal traffic was scanty, business in the commercial sense was not known on an extensive scale, and the system of credit was not developed. Local courts were occupied in administering justice, and separate ecclesiastical tribunals were not formed in England. The Bishops and Elders of the towns were accustomed to hold courts in their own places, and small fees were paid to them. The Courts of Hundreds and of Counties were established, and the King exercised general supervision over these local courts. The Sheriff presided in the County Court and represented the King. The procedure was very rigid. The method of proof was an appeal to supernatural power. The simplest kind of proof was the oath of the parties. There must be guarantees to support this oath. It was not practicable to frame rules of evidence so there was no burden of proof during the Anglo-Saxon

¹ Pollock and Maitland's *History of English Law*, 2nd edition, Vol. I., p. 57.

period. Ethelbert and Alfred were eager to reduce the customs of the kingdom to writing. The records when made were called dooms. The Anglo-Saxon Law was mostly concerned with the conditions of persons as freemen and slaves. The chief concern of the courts was to see that peace and order was maintained, and they punished gross evils such as wounding and the shedding of blood.

King's Peace. The King's Peace contributed largely to the development of the King's Court. To be in the King's Peace was a distinction, because it afforded special protection. It was at first confined to a few of his close followers and was gradually extended to the places where they happened to be, such as courts and palaces, to the army meetings of Shire and Hundred and to great roads. The King's officers were specially protected. The justice extended far and wide. It was at first confined to a few. It had to be claimed distinctly in proper form. The technical use of the King's Peace is connected with the very ancient rule that a breach of the peace in a house must be atoned for in proportion to the householder's rank. If it was in the King's dwelling, the offender's life was in the King's hands. This peculiar sanctity of the King's house was by degrees extended to all persons who were about his business or under his protection. When the Crown undertook to keep the peace in every place, the King's Peace became coincident with the general peace of the kingdom and was extended to all subjects. From having first to be claimed, it gradually became a common right which the courts took for granted without further inquiry. This is the origin of public justice and of the gradual growth of the idea of public justice as it was exercised on behalf of the whole kingdom; this idea is distinct from the right of private revenge which the injured party may pursue if he likes. The private blood feud has given place to something else in the shape of compensation.

The transactions of sale and barter were carried on openly in the presence of witnesses, so that in the event

of any dispute the neighbours could come and state what actually took place. Edgar IV passed ordinances that if the parties failed to take such precautions forfeiture would result. Hence all transactions were carried out openly and publicly.

In loan and exchange the gist of the action was the fact that one man had parted with his chattels to another and the other was under obligation to return them. Among the Germans, according to Sohm, there were no consensual contracts but only real and formal contracts. The contract of sale was real, and the contract was complete as soon as price or *abray* was paid. If anybody detained the goods of the plaintiff wrongfully the proper remedy was *detinue*. In Y.B. 21, 22, Ed. I (R.S.) 468, it is stated that where a thing belonging to a man is lost, he may count that he (the finder) tortiously detains it and tortiously for this that whereas he lost the said thing on such a day, he, the loser, on such a day found it in the house of such an one and told him and prayed him to restore the thing but that he would not do so to his damage. In this case the demandant must prove by his law that he lost the thing. There is a great resemblance between *detinue* and *debt*¹. All things that consist in number (except money), weight or measure should be demanded by way of *debt*, thus the law commands that the defendant renders as many quarters of wheat or so many sacks of wool, of such a price and not chattels to the value of, etc. And in the Count the plaintiff shall say 'wrongfully' the defendant detains from him so many quarters of wheat of such a price².

¹ Y. B. 3, 4 Ed. II (S.S.) 26. (Debt and *Detinue*).

² The following are instances:—Y. B. (1292) 20, 21, Ed. I. R.S. 304-6 lease and rent due. One A leased a mill and three acres to H for 10 marks. A died and his executors sued in debt.

Y. B. 21, 22 Ed. I. (R. S.) 2 Debt.

Y. B. 21, 22 Ed. I. (R. S.) 254—256 Money lent.

Y. B. 33, 35. Ed. I. (R. S.) 86. This was a deed and the creditor sued the sureties for the debt.

Quid Pro Quo.

These cases are important to show that in an action of debt the plaintiff must show that there is *quid pro quo* and he has to prove it. Salmond¹ says that there is no attempt to generalise the causes which gave rise to debt. We get a more or less complete list. They were species of Contracts then known to the society, *e.g.*, loan, sale, suretyship. When these different causes of debts were generalised, we see the dawn of a general theory of contract. In these days each party has to do something. The name given to the generalisation is *quid pro quo*. The rule was that unless and until the plaintiff could prove that the defendant had received something in recompense for the obligation which he wished to enforce, he could not succeed. This rule did not apply to suretyship because it was unilateral contract, and yet it gave rise to action of debt. Y.B. 7 Ed. II. 242. The contract of suretyship could be established by witnesses. In both actions of detinue and debt the point of *resemblance* is this, *viz.*, the plaintiff claims that something which he has given, be restored. It is stated in pleadings that the defendant detains the thing wrongfully, and refuses to pay what he owes, *e.g.*, Y.B. 20-21. Ed. I.(R.S.) 138-140. Debt, detinue of chattels. Showeth unto John that *B* tortiously detains from him chattels to the value of £10. John has claimed those chattels and *B* does not pay them, and still refuses to pay tortiously in breach of covenant.

Y.B. 11 and 12. Ed. III. (R.S.) 586. A writ of debt was brought against one; he counted that the plaintiff by covenant between himself and the defendant had been made his attorney for ten years, taking 20 shillings per year which were in arrear Scharshulle. "Here you have his service for his knowledge of which knowledge may be had and you have *quid pro quo*". Also in the case of *goods* sold, though not of land, the buyer may take the goods; this follows from the theory of reciprocal grants. The plaintiff brought a writ of Covenant but relied on writ of debt and lost his action.

¹*Essays* at p. 181.

One may have a writ of debt in many cases where a writ of Covenant also lies. But the party has option¹. In debt the plaintiff claims equivalent of the thing due. In detinue the plaintiff claims the very thing². Debt was demanded by an heir against an heir in a case in which the plaintiff counted that the ancestor of the defendant bound himself and his heirs to the ancestor of the plaintiff and his heirs, but he did not make the descent in the Covenant and he put forward a speciality. Gayneford "You demand as heir and in the writ you are not called heir"; judgment on the writ³; This case shows that creditor could demand the property as his, but executor could not⁴.

Among the Franks and Lombards undertak- Earnest.
ings were guaranteed by confiding one's faith, *fides facta*. This was a symbolic ceremony by which the creditor received from the debtor a rod or handshake; the creditor passed it on to the surety. Here the binding force was derived from the ceremony; giving was not the turning-point of obligation. There were various forms of ceremony among the Franks and Lombards, which gradually developed into gage which was given as a security, i.e., God's penny, earnest. In *Essays on Anglo-Saxon Law* (at p. 180) the following account is given.

The earliest procedural needs of the Germans seem to have been for debt and this procedure was very limited and had the stamp of the executive period. The German Civil Actions were founded on contracts. A contract in German Law was not binding through the mere agreement of the wills of the contracting parties, but as in the old Roman Law only by the performance of a fixed formality or a fulfilment by one party.

Loening, on the other hand, is of opinion that *fides facta* was a simple one-sided promise based on the will

¹Y. B. 37 Hen. VI., 8 pl. 18 . (R. S.) 170.

Per Prisot, C. J.

⁴Edgecomb v. Dee. 1670,

²In Y. B. 12, 13, Edw. III (R. S.) 170.

Vaughan's Report, p. 101
"Contracts of debt are reci-

³Y. B. 12 and 13, Ed. III procal grants".

of the party bound and unrestrained by outward form. According to Sohn, among the Germans there were no consensual but only real and formal contracts. In the contract of sale in which the seller was bound to the buyer only if he had received payment, the contract was not consensual but real and conveyed a title to ownership. But to free the buyer from the risk of making actual payment, while yet preserving the efficacy of the contract, German Law introduced, instead of payment, the earnest money (hand geld) the equivalent of the *arrha* of the Lombard Law, with the effect not of strengthening the contract as in Roman Law but of concluding it. The *arrha* was comparatively worthless and was in fact payment; but it was the means of judicially binding the agreement made by the parties and a real right arose from it.

The formal contract of the Germans was not concluded, as in Roman Law, by the use of writing or a fixed form of words; but on the Continent by the delivery of the straw (*festuca*). Instead of a glove, an arrow, a stick or any other object could be used.

This was the German "*wette, wadium (wadia)*" of Lombard Law and the Anglo-Saxon *wed* being derived from the root *vidan (obligate)*, it signified the means of legally binding the agreement of the parties. The formal contract was used in a unilateral case such as the Anglo Saxon *borh* or *plegium* or the Frankish *fides facta*, where the party promised to bring proof or make payment; or to furnish the security of bail. As an institution of private law, it was the basis of marriage and of all bargain and exchange and was concluded in the person of witnesses. "And let no man either buy or exchange unless he have borch and witnesses¹" Note. The *arrae* in Roman Law were deposited with the seller as a proof that the purchase had been made, *e.g.*, a ring. The giving of earnest is treated as quite different from part payment². Earnest is not a partial or symbolic pay-

¹ Althair 1, 3.

M. History of English Law,

² Dig. XIX, 1, 11, 6. P. and

Vol. II. 208-9.

ment of the price but a distinct payment of the seller's forbearance to sell or deliver a thing to anyone else, *cf.* the words of Statute of Fraud, "something in earnest to bind the bargain" and "part-payment" are distinguished but are thrown in the same clause. In Glanville's time if the bargain was completed, the earnest was forfeited. The seller who had received earnest had no right to withdraw from the bargain, but Glanville leaves the point uncertain what penalty he was liable to pay. Bracton (folios 61 b, 62) states, that if the purchaser repents of his purchase and wishes to recede from his contract, let him lose what he has given; but if the vendor repents let him restore double of what he had received as earnest-money. Bracton here uses the words of Institute 3. 23. Sir Edward Fry in *Howe v. Smith*¹ accepted the view of Glanville and Bracton. In *Fleta* (pp. 126-7) the Law Merchant was very strict and a pound was to be forfeited for a penny. Among merchants, giving earnest means binding a contract of sale both on the seller and purchaser. All over Western Europe earnest is known as the God's penny. In Law Merchant God's penny is sufficient to make a binding contract of sale. By Statute of *Mercatoribus*² it was enacted that God's penny binds the contract of sale so that neither party may recede from it. This rule was accepted by the Common Law of England. If the bargain be, that you shall give me ten pounds for my horse and you give me one penny in earnest, which I accept, this is a perfect bargain, you shall give the horse by an action on the case and I shall have the money by an action of debt³. Earnest only binds the bargain and gives the party a right to demand; but then a demand without the payment of the money is void⁴. The Church enforced oaths by means of penance. There was reason why Canon Law claimed to enforce agreements and to assume jurisdiction over breaches

¹Ch. 27, Div. 89, 102.

²13 Edw. I. Statute 3

³Noy Maxim, Ch. 42.

⁴*Langfort v. Tiler* I, salk 113. per Lord Holt.

of faith. The Church insisted on having every legal act to be embodied in writing. When Roman Law had become widely known in Europe, the conception of contract required that there must be some form in addition to agreement. Azo introduces us to the theory that pacts require vestments. A pact may be vested in one of six garments or, in other words, a contract may be made *re, verbis, scripto, consensu, traditione, iunctura*, Canon Law did not pay attention to the vestments or forms so much as to the bare agreement itself. The Church enforced oaths of a new model by means of penance and did not distinguish between the assertory and promissory oath¹. Ecclesiastical Law took cognizance of cases of contract on the ground that it was a Christian duty to keep one's faith. Canonists spoke lightly of forms and ceremonies and *nude pact* was enforceable by penance and other Church discipline.

Glanville.

Glanville is reputed to be the author of a treatise on the Laws and Customs of England. He was chief justiciar in the reign of Henry II. The date of the book is between 1180—1190 A.D. The only part of the work which suggests Roman influence is Book X which deals with contracts. Some terminology is Roman. The terms of Roman Law are used such as *mutuum, depositum, commodatum*, but the law is not Roman Law. Sale is not a consensual contract. It is a real contract. The risk of the thing sold and purchased generally belongs to the seller unless it be differently arranged²: There is no classification of contracts in his book. They are said to result in debt. A debt arises by giving securities or pledge or writing. The King's Court would not enforce promises. The tenth book has a distinct Roman appearance, and Bishop Nicholson has accused Glanville of 'aping the Roman Code'³. He follows the Roman division of contracts. *Mutuum* is defined as in Roman Law as dealing with things *quae consistunt in numero*

¹ Bracton and Azo S. S. 143;
P. and M. *History of English*
Law, p. 188.

² Glanville X. 14 translation
by Beames.

³ Beames, p. 246. note.

*vel pondere vel mesura*¹, Glanville plunges into security of *datio plegiorum* which shows no trace of influence of the law as to *fide jussores*. In Chapter 6 he speaks of lands and tenements as lent as a *mutuum*. If a thing is lost or destroyed the borrower is to pay reasonable price, while in Roman Law it was only if the borrower had not used *exacta diligentia* except in the case of *mutuum*². The sale was complete as soon as the price was fixed. Glanville also required delivery or payment in whole or in part or earnest, *arrha*. An express warranty of quality was necessary to support rescission while in Roman Law implied warranty was given in all contracts. Remaining chapters are filled with purely English procedure.

All contracts which could not be proved by evidence of writing transaction witnesses were matters for ecclesiastical courts. Hence contracts, neither in writing nor involving transfer of property, did not come before King's Courts. The study of Glanville's book shows that he borrowed very little from Roman Law except the terminology. There are large omissions and variations and terms are used with different meanings. Its Roman appearance may have been derived from clerical judges of Ecclesiastical Courts, which punished breaches of contract as *laesio vel transgressio fidei*³. The Constitutions of Clarendon (1164 A.D.) prohibited Ecclesiastical Courts from trying pleas of debts when a pledge was given. In Glanville's treatise two permanent traits are (1) remedy is dependent upon writ. In Bracton this point is emphasised. (2) The practice of quoting decided cases by way of precedent.

Bracton's treatise (1259 A.D.) is an attempt to treat Bracton. the whole extent of the law in a systematic and practical manner. Bracton has copied from Azo who early in the thirteenth century was the leader of the Bolognese school of law which did so much to revive the study of

Just. Inst. III. 14 pr.

² Gutterbock, p. 61 note.

³ Glan. X. 13. Justinian Inst.

III, 14, 2.

Roman Law. Azo's writing had produced a great effect upon Bracton¹. In Bracton's treatise the Roman element is very largely used. Sir Henry Maine says that "Bracton put off on his countrymen as a compendium of pure English Law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris²", Reeves says³: "But the passages to which such writers take exception, if put together, would perhaps not fill three whole pages of his book, and it may be doubted whether they are such as can mislead the reader". He also says of those places where Roman Law is stated with most confidence, "it would seem to be rather alluded to for illustration and ornament than adduced as authority". Maitland says this is an exaggeration, that the amount of matter Bracton directly borrowed from the Corpus Juris is not one-third, nor even a thirtieth part of his book, but Bracton has borrowed largely from Azo.

By English Law contracts could only be sued upon in Curia Regis if either party performed or embodied them in a sealed writing. All other *stipulationes conventionales* were called by Bracton *nuda pacta*. The term thus appropriated underwent great changes of meaning. At Roman Law it had been, not an agreement made without consideration, but an informal agreement which did not come within some one of the privileged classes which were actionable or which had no *causa* or mark assigning it to one of the recognised methods of proof in the King's Court; viz., (witnesses, writing or duel). Two hundred years later it had come to mean a promise where nothing is assigned as reason for its being made, an agreement without consideration. Chitty on Contracts p. 217 writes: "The earliest records of English Law show that the maxim *ex nudo pacto non oritur actio* was recognised in English Law. This principle is not peculiar to English Law at all. It was recognised in

¹Maitland's *Bracton and Azo* (S.S.) 1894.
Ancient Law, ch. IV., p. 82.

²*History of English Law*, Vol. II, p. 88, ed. by Finlason.

Roman Law and it is borrowed from Roman jurists, the term *nudum pactum* was applied to promises without consideration." By Civil Law of Rome a verbal promise was binding if made with prescribed form. Such an obligation was called stipulation. Bracton adapted Roman Law by merger of obligations, *verbis et litteris*, and found a connecting link between Roman principles and English Law. Bracton omits the rule *Alteri Stipulari nemo protest*¹ and makes such a stipulation possible even *sine poena*. Bracton mentions *ex consensu* contracts², but he makes no use of purely consensual contracts because King's Court cannot enforce them. Similarly he mentions *quasi ex contractu* but makes no more reference³.

The first four chapters of the third book of Bracton are composed entirely of Roman materials⁴. The form is Institutional and Academic. The division of obligations is taken from Justinian and the subsequent doctrine of *Vestimenta pacta* is civilian⁵. The word obligation is defined in the words of Azo following Institutes⁶. The different obligations are dealt with in the words of Justinian, while the general treatment of obligations is Institutional. Bracton has adapted it to English Procedure⁷. Scrutton⁸ concludes that the part which Bracton has verbally copied from Azo and Institutes or Digest consists of 25 folios out of 450; Book III, folios 98b, 104b deals with contracts taken from Institutes or Digest Book III. The question has been asked as follows: Did Bracton, as Spence and Gutterbock think, use Roman Law as a trustworthy source and not as a plagiarist, or did he as Sir Henry Maine suggests, introduce new Roman matter as English Law? Scrutton is of opinion that as regards the first part of

¹Justinian, *Inst.* III 19, 19 and 21. Bracton, F. 100b.

²F. 100 b.

³Bracton, F. 100b, Justinian *Inst.* III, 27.

⁴98b—104b.

⁵Justinian *Inst.* III, 13, 2. Gutt. 140.

⁶Bracton 99; Azo 304, and *Inst.* III, 13 pr.

⁷Bracton F. 99b, 100 *Inst.* III, 15, 19.

⁸Roman Law and Law of England.

Bracton's work, it was new matter to English Law directly copied from a Roman source, to fill up a framework of his first three books which he had adopted from the Institutes. As to the second part, Bracton introduced new Roman matter and reproduced Roman Law through the decisions of clerical judges and then recognised as the Law of the Land. Pollock and Maitland¹ write: "Bracton uses citation rather as the highest authority in the solution of difficult and doubtful questions, or to establish the origin and existence of a principle of special character or recent date". Gutterbock says²: "Bracton copies Roman Law when it is English Law and only as such. The very errors of Bracton show Roman Law as he puts it errors and all to have been English Law."

The great peculiarity of English Law in Bracton's time is writs. Writs could not be changed without the consent of the council of the realm. It was very difficult to do substantial justice when the procedure was very rigid. During this time various defences were allowed. They were technically known as "exceptions". This was of Roman origin. Here we see the dawn of the science of pleading, which in the future became the most exact and occult science. In Bracton's Account of Contract we see the Roman element very clearly but it had produced no influence on the English Law at all. Bracton deals with Obligations and actions in folios 86—107. He treats of Actions and Obligations together. Bracton's book was used as a text-book on the laws of England.

Fleta.

The treatises known as Fleta and Britton and a Summa by Gilbert de Thronton are epitomes of Bracton. Selden says of Summa that as usual with epitomisers he passes by a great many things, nor does he always follow Bracton's method, but sometimes makes a different distribution³.

¹*History of English Law*, Law, Trans. by Brinton Cose. Vol. II. p 187. Phua 1866, A. D.

²Henricide Bracton. *Bracton and his relation to the Roman* ³Gutterbock p. 68.

Fleta ed. 1647 is believed to have been written Briton. about 1292¹.

Besides abridgement of Bracton the author adds new matter but follows Bracton's arrangement². It is written in French, between 1290 and 1300. The work as a whole is far more practical and modern than the work of Bracton. The civilian influence is less than before and the Roman element is much reduced. The Roman influence has not been produced on the writs or the practice of the lawyers.

Sir H. Spelman³ says: "I think the foundation of our laws was laid by our German ancestors, but built upon and polished by material taken from the Canon and Civil Laws".

Sir E. Coke⁴ says: "Our *Common Laws* are aptly called laws of England because they are appropriated to this kingdom of England and have no dependency upon any foreign law whatever, nor upon the Civil or Canon Law other than in cases allowed by the laws of England." The study of the Institutes of Coke suggests that the common lawyers of the time expressly repudiated the Civil Law as an authority in the King's Court or even as a parent of existing Common Law. The working out of Equitable Jurisdiction and decisions of the Ecclesiastical and Admiralty Courts were building up systems largely of civil origin, but in the Common Law the influence of Roman Law was decreasing. Fitzherbert refers to Bracton in Hil. 35. Hen. VI. (1457). Coke cites Bracton frequently without quoting his authority and Lord Hale speaks of Bracton's work as great evidence of the growth of our laws between the time of Henry II and Henry III, and the great part of its substance is either of the course of proceeding in the law known to the author, or of resolutions and decisions

¹ Swiss Bracton VI. Pref. 18.

² Britton Nicholl's edition Vol. II, Clarendon Press, 1865.

³ On *Law Terms*, published in 1723, written about 1614

⁴ II *Institutes* 98.

in the English Courts¹. Fortesque B. and Parker C. J. and Montague B. in Grand opinion² have upheld the authority of Bracton. Parker C. J. said: "As to the authority of Bracton, to be sure many things are now altered, but there is no colour to say it was not law at any time, for there are many things that have never been altered." Blackstone³, includes Glanville and Bracton in his list of venerated authors. These Roman doctrines, he says, are implicitly, copied and adopted by our Bracton and have since been confirmed by many resolutions of the Courts. Best C. J. in *Blundell v. Catterall*⁴ supports Bracton very strongly. "It is impossible" he says, "that Bracton should not have found the principles there laid down in the Civil Law or in any other well digested Code for they are directly derived from the law of nature. I do not say that the whole of the passage in Bracton is good, it was good law at the time he wrote, and all of it that is adapted to the present state of things is good law now". In *Gifford v. Lord Yorborough*⁵ House of Lord's decision, Best C.J. said: "To form a system of law sufficient for the state of society in the times of Henry II, both Courts of Justice and Law writers were obliged to adopt such of the rules of the Digest as were not inconsistent with our principles of Jurisprudence. Wherever Bracton got his law from, his authority has been confirmed by modern writers and by all the decided cases⁶".

There was a revival of the study of Roman Law in England and various attempts were made to find some general law about the validity of agreements. This effort is seen in the attempt of Azo to describe vestments as necessary to enforce pacts. In Bracton and Fleta we have seen an attempt made to employ the general principles of Roman law as a setting for English contracts

¹*History of England* by Lord Hale published in 1713, written before 1676, p. 189.

²*Fortesque's Reports* pp. 401—440.

³*Commentaries* 1765, Vol. IV, pp. 421, 425.

⁴1821, 5 B 268 and Ald.

⁵5 Bing 163.

⁶*Nugent v. Smith* 1875, L. R. 1 C.P.D. 18.

"But the chief significance of this attempt lies in its failure. Perhaps in no other part of the law have Roman principles been so prominently introduced only to be so completely rejected¹". At the end of Henry III's reign we find that there is no general doctrine of contract.

In the law of contract ecclesiastical law gained support because there was a pledge of faith. Sacred texts of the Bible were cited in order to show the sacredness of oath. The law of marriage was exclusively within the ecclesiastical jurisdiction and *nude pacta* were enforced by penitential discipline².

On the Continent the process of arriving at a general law of contract was quite different from that adopted in England. There was a competition going on between the secular and spiritual courts during this period nearly all over Europe. In Italy Roman Law was revived fully and a naked promise, if clothed in proper vestments, was enforced. In Germany and the North of France Teutonic formalism was slowly removed by the new principle. In England Christian Courts were expanding their dominion considerably till the King's Court began to compete with them. In France the test was this: Is there a cause for the agreement in question? It may consist in moral obligation or the mere intention to make a gift. If it was entirely absent, contract was not in existence at all. The cause is a mark, whatever may be the particular case which distinguishes any particular class of agreements from pacts which can be sued on. In Italy action *de dolo* was allowed for damage caused by breach of an informal pact. This action was like action of *assumpsit* in English Law because informal contracts were gradually enforced by its means. The method which the Italians favoured was this: They required an additional express promise (*pactum geminatum* or *duplex*) as the equivalent of vestment of natural obligation and as such it was actionable. In English Law the view once prevailed that if express

Roman Law
on the Con-
tinent of
Europe.

¹Salmond *Essays*, p. 177.

²Seuffert 47.

promise was given to carry out an existing moral duty, an action of *assumpsit* could be brought. The English Law in its earliest stages is almost entirely Teutonic, and there is no evidence to show that it is of Roman origin. We have seen the revival of Roman Law in the latter half of the twelfth century. England has shared in that European revival. The Ecclesiastical Courts rule themselves by the Roman Law, and from their proceedings Roman influence affects the work of Glanville. Bracton's work contains much Roman matter and terminology but his knowledge of Civil Law was only that of a clerical judge of his time. There was reaction. Roman Law was distrusted in England owing to the conflict between King and Pope. Coke, Hale and Blackstone have declared that Roman Law itself is not binding in English Courts unless it has been accepted by the English Law. The one idea that English Law has borrowed from Roman Law is the idea that *bare agreements* are not enforceable at law'.

Blaik—' Then you admit that it is rent service '.

Thorpe—' No ; I am a stranger to the deed and perchance it is void ; but if rent vested by that deed, it would be rent service.'

Hilary—' How should he have relief or escheat if not by reason of Seignory ?

Blaik—' This I say that he would not have an action for either, except by way of covenant against his grantor '.

Basset—' *ex nudo pacto non-oritur actio* '."

Procedure.

All ancient procedure is formal. The great peculiarity of this period is that a new and written procedure was gradually introduced, and the oral and traditional formation was disappearing. The English Law passes under the domain of the writs which flow from Chancery. It is mainly due to the fact that the English Kingship is very strong and powerful to assert its influence in the domain of law. Henry II and his successors did much to improve the judicial system. The Roman influence

was greatest during the twelfth century. The traces of Roman Law are to be found in a few terms of law. But it has produced no benefit to the practising lawyer, because his aim was practical and not scientific.

The chief point in this connection is to bear in mind Writ, that every litigant was bound to obtain a writ from Chancery before an action could be brought in the King's Court¹. A writ is indeed a rule of law when it has been drawn up, because it expands and explains the declaration of the party producing it. The issue of the writ is the first step to a contest in the King's Court. The modern writ is the King's command to the defendant to appear personally or by solicitor, or to cause appearance to be entered within the time mentioned, and in case of default judgment will be given in the plaintiff's favour. On the back is stated shortly the plaintiff's claim with the facts giving rise to that claim. But during the period under inquiry that was not possible because the acceptable number of writs was very limited. The writ was addressed to the King's Sheriff who was commanded to see that the defendant paid the debt, and if the defendant failed to pay, the Sheriff had to report to the Court.

In Bracton's time the forms of action were (1) Personal; (2) Real; (3) Mixed².

Personal actions are such as may be brought against anyone upon a contract or something like a contract; upon a tort or something like a tort when anyone is bound to give or to do something, and they have a place against him who has made the contract, and against his heir unless there be a penalty. Actions for a thing are those which are allowed against a possessor of it, who possesses it in his own name from whatever cause, and not in the name of another person, because he has the thing or possesses it, so that he may restore it or name the person who has control over it. It is action

¹ Cf. Bracton F. 413 b.

² F. 102.

for the thing itself and not for its value. Mixed actions partake of the nature of both claiming a thing itself and also damages for injury."

The Real Property Limitation Act of 1833¹ has repealed this distinction. The words are : " Real and mixed actions are abolished after 31st December 1834 except for Dower, *quari impedit* and ejectment² ".

The Common Law Procedure Act² abolished Dower, Writ of Right of Dower as Real action and enacted to begin by writ of summons.

The Uniformity of Process Act³ enacted that " where-as the process for the commencement of Personal Actions in His Majesty's Superior Courts of Law at Westminster is by reason of its great variety and multiplicity very inconvenient in Practice for remedy thereof.....be it enacted that the Process in all such actions commenced in either of the said Courts shall be by a writ of summons.

The Common Law Procedure Act⁴ provided that it is not necessary to mention any form or cause of action in the writ of summons or Notice of Writ of Summons.

The Judicature Act, 1873, section 24⁵, enacted that " in every civil cause or matter commenced in the High Court law and equity shall be administered by the High Court and Court of Appeal concurrently ". Thus the jurisdiction is combined in one system.

In the Middle Ages there were different kinds of actions. In the Year Books we find them mentioned, and the study of the various forms of actions leads us to believe that procedure was the very essence of getting redress and right was quite an insignificant matter. The real skill consisted in finding out the appropriate form of action. If there was any mistake made in selecting,

¹ 3 and 4 William IV, c 27,

S 36.

² 2, William IV, c 39.

³ 1852, 15 and 16 Vict. c 76.

⁴ 23 and 24 Vict. c 126, S 26.

⁵ 36 and 37 Vict. c 66.

it was quite fatal to the result. Glanville has given several writs¹. The peculiarity of the procedure is that it leaves no discretion in issuing writs. The procedure is very rigid. Its rigidity can be defended on the ground that the judges in those days were not above petty favours and whims; public opinion was not strong to criticise any kind of miscarriage of justice. Again trials were not public, and criticism was quite absent. In the reign of Henry III forms of action became varied and took root in the system of English Law. It was very difficult to secure jurisdiction on the part of the King's Court. There were Local Courts, Shire Courts, Hundred Courts, County Courts and Feudal Courts. The King's Court gradually drew almost all the work to itself. At first the King's Court had jurisdiction over pleas of the Crown and over matters touching the King's peace and dignity.

Procedure in the courts was peculiar. Proof came before judgment. To-day we regard proof as a means of convincing a judge, who gives judgment on the evidence before him. It is not true of the old procedure, *e.g.*, if two persons were fighting, one would charge the other with an unlawful act: the judgment would be that one of them must prove his case. The judgment would decide who had to convince the judge. The means of proof are oaths and ordeals. Oaths are of various kinds. The oath was everything. The party was required to swear with compurgators or oath-helpers. This is found in the Anglo-Saxon, German and Welsh systems of law. Sometimes these oath-helpers were kindred, and the value of the oath varied according to the nearness of their relationship.

Maitland says another method of proving a charge was to call witnesses after judgment to show which of the contending parties was to prove his case. Those witnesses were men of credibility. If they were not worthy of credit, the other side would charge them with perjury.

¹Beames 1812, pp. 286— Book III. Treatise I.
288; Bracton ff. 98b-115

Jurors were not required to hear evidence. Appeal was made to the heavens to speak the truth through the medium of jurors. As the transactions of early society were carried out in public, we can understand how witnesses would be in a position to swear to the truth of the transaction. In the time of Edward II the jurors were called by the court or sheriff to swear to the truth. In Anglo-Saxon times jurors were called by the party to swear¹.

The Ordeal was used in graver and more heinous charges. It was an appeal to God direct. The methods were various, *e.g.* (1) Hot iron : the accused person had to lift a red-hot iron, and was required to walk over the same without being burnt. (2) Hot water. (3) Cold water. (4) Morsel. Trial by Ordeal was abolished by the Lateran Council in 1215 A.D. Trial by Battle was resorted to but the Church discountenanced it ; it was abolished in 1819².

Jury.

The germ of trial by jury is not to be found in the Anglo-Saxon system or in the procedure of Norman Courts. It has its origin in the courts of the Frankish kings. The kings of the Franks had come in contact with the Roman kings who used to dispense with dilatory modes of procedure. The Frankish kings constantly issued inquisitions in order to ascertain the royal rights. Gradually this privilege was sold, especially when questions of property given to religious bodies were to be determined. There could be no combat in such cases. The judge would summon neighbours and on their oaths, would decide the points at issue. Here are to be found the traces of the modern system of trial by jury. The officers of the court would summon a body of neighbours and they would testify to the truth of the points in dispute from their own personal knowledge. This procedure was adopted to find out the crimes committed against the peace of the king. The king would send out his officers to hear complaints and to hold inquisitions.

¹ Bigelow *Placita Anglo Nor-* ² 59 George III, c 46.
manica, p. 24.

This was the origin of the system of itinerant justices going round to hear charges from the neighbours. The inquisition was the parent of the modern system of itinerant judges and this idea was borrowed from the Franks. In Normandy this method of inquisition was commonly used to determine rights about the dukedom. When the Normans came to England, this idea was popularised, *e.g.*, the Doomesday inquest was very popular. In the beginning only the rich and powerful could resort to inquisitions and this mode of trial was confined to purposes purely administrative but gradually it was extended to litigants and became very popular in Henry II's reign. These inquests were of various kinds, *e.g.*, Grand Assize, Possessory Assize, Trial by Jury. Glanville (11.7) writes: "The Grand Assize is a certain royal benefit bestowed upon the people and emanating from the clemency of the Prince, with the advice of his nobles. So effectually does this proceeding preserve the lives and civil condition of men that everyone may now possess his right in safety at the same time that he avoids the doubtful event of the duel".

The Possessory Assize. He who was ejected (disseised) from the freehold, could claim a writ directing the king's justices whether there had been disseisin or no. Here the witnesses were asked questions of fact. Stubbs¹, says the term Assize which comes into use in the middle of the twelfth century on the Continent as well as in England, appears to be the proper Norman name for edicts. The Assize possesses the characteristic of tentative or temporary enactment. It is to be in force so long as the King pleases. The tenant puts himself on the grand Assize of our Lord the King and thus the action is removed from the Lord's court to the King's court. In these Assizes the original writ directed the summoning of a body of recognitors to give sworn answers to a particular question formulated in that writ. Glanville says that certain incidental questions

¹ *Constitutional History*, Vol I., p. 614.

may be raised in an action which will be decided by the oath of twelve men. He further¹ gives specimens of the questions to be tried by the Assizes.

The jurors in a *jurata* were not liable to conviction for perjury or infamous judgment, as were the jurors in Assizes, because the parties had chosen their own juries, while the Assize was a special remedy granted in a special case by the law to redress the wrong. If the jurors were dishonest and gave a false verdict, they were liable to punishment. The *jurata* decided some points of fact which were necessary to be determined before a final decision could be arrived at.

(3) Trial by Jury. Litigants have ordinarily inquest to determine facts. This process is gradual and varies with the form of action. The *jurata* takes the place of Assisa. When the King sent out his judges to collect revenue, many fiscal questions would crop up. The accusers are twelve sworn members of the hundreds. Their testimony was not conclusive. Grand jurors gradually took their place and their sworn accusation is what is known as indictment.

The Petty Jury. The ordinary mode of accusing any person of a crime during the Norman period was to complain. This led to the establishment of trial by battle. In Henry II's reign such questions could be tried by neighbours instead of resorting to the doubtful result by duel. Magna Charta² declares that nothing in future shall be given or taken for a writ of inquisition of life or limb but freely it shall be granted and never denied. This clause of Magna Charta has a great bearing on trial by battle. Henry II invented a new mode of determining the innocence or guilt of the party by the verdict of neighbours. In all Civil Actions trial by jury was a very common method of deciding disputes as to rights.

Evidence by
Charters.

Glanville says (X. 17) debts arising from a purchase are usually substantiated by writing or by duel. These

¹Glanville XIII. 14, 15.

²Chapter 36.

are the two normal modes of proof. The English Charter of feoffment and memorandum of livery of seisin are really the *Carta* and *notitia* familiar in Continental practice. The deed of mediaeval English Law is imported from Normandy because Frankish kings made much use of deeds. The old Roman formal contract, the stipulation by question and answer was transformed into a written contract. Moyle¹ gives the following account. The word *stipulatio* is derived from *stipulum* meaning firm, settled. Savigny connects it with *stips* and maintains that stipulation originally rested on the fiction of a loan of money. *Stipulatio* was an agreement in a solemn question and answer. In Justinian's days it had lost its original meaning, and had ceased to be a formal contract. The original solemnities of stipulation have given place to a written memorandum of a promise fictitiously represented as having been made in answer to a preceding question. The formal contract of Roman Law was a *stipulatio*, which corresponds to the contract under seal in English Law. The charter granted by Bishop Oswald² contains the word *astipulantibus* meaning signature or execution of a written document. Stipulation was an instrument in writing purporting to be the record of an agreement and was regarded as strong evidence of the stipulation having taken place. Hence the origin of writing in the middle ages. All proof was conclusive when it was made in proper form. Salmond³ writes : " The law recognised a certain number of method of proving facts. If the party on whom the *onus probandi* lies, succeeded in following out the prescribed method of proof, he prevailed ; if not, he failed. What the court thought as to the real facts of the case was entirely irrelevant. Proof was what satisfied the law, not what satisfied the court ". When the matter in issue was the proceedings of a court of justice, the proper proof was the testimony of the *recordatores* (the recorders or remembrancers of the court) on rolls of the court. If

¹ *Institutes of Roman Law*, *Diplomaticus* Tome III, p. 174, pp. 333, 334.

No. 623.

² Printed in Kemble's *Codex*

³ *Essays* pp. 15, 16.

writing were produced to prove the facts in dispute, that writing was the conclusive proof. Afterwards, when the jury system became established the testimony of *juratores* was decisive. A deed was binding owing to its form and if a promise to pay debt was recorded in a deed, the action would lie upon that deed alone and not upon the promise. Glanville (X) writes: "We briefly pass over the contracts arising as they do from *consent* of private individuals because the King's Court does not usually take cognizance of them; nor indeed with such contracts does the King's Court intermeddle". Maitland says: "The King's Court will not trouble itself about conventional stipulations, that is about contracts made outside the court and by mere word of mouth¹; Bracton does not deny that the extra judicial stipulation (parol agreement) is binding. The King's Court will sometimes enforce it as a matter of grace.

The Ecclesiastical Courts claimed to exercise jurisdiction over all causes of broken oath or faith. The Civil Courts admitted the limited right only. This limit was prescribed in the two writs of prohibition: (1) lay fee, (2) chattels or debts except marriage and testament. Glanville (XII, 21) gives the writ of prohibition as follows:—

"The King to the Ecclesiastical Judges—health.—I prohibit you, lest you hold the Plea in Court Christian which is between *N* and *R* of the lay fee of the aforesaid *R* of which he complains that *N* draws him to Plea in Court Christian before you, because such plea belongs to my Crown and Dignity, Witness, etc". Maitland writes: "Thomas, son of Jordan, summoned to show why he had brought William Russell into the Court Christian touching a debt of twenty marks, contrary to the prohibition, comes, defends and wages his law². Maitland³ gives an article on the History of the Register of Original writs and mentions the Writ of

¹Bracton and Azo S.S. 152.

²In III *Harv. L. Review*.

³*Select Civil Pleas* S.S. p. 83.

Prohibition which was issued to ecclesiastical judges dealing with lay fee, and a writ to compel them to answer for breach of such a prohibition (Nos. 39 and 40). The *Registrum Brevium* (1594 fol. 34) contains a writ of Prohibition issued against the Bishop of Lincoln and his officers, prohibiting them from entertaining suits concerning debts and chattels. The Constitutions of Clarendon, 1164 A.D. provide that the justices shall decide the question of jurisdiction in doubtful cases and determine whether the question in dispute should be tried by civil or ecclesiastical court.

Stubbs¹ says the King's Court has got jurisdiction over all pleas of debt. Glanville (X. 1) says Pleas concerning the debts of the Laity also belong to the King's Crown and Dignity.

The Courts Christian took cognizance of the pleas of debt even when there was no breach of faith and in spite of there being a proper remedy to be found in the Civil Court. The judges of the King's Court maintained that the only promises that could be taken cognizance of by the spiritual courts were those which related to spiritual matters only². In order to recover against a defendant who denied his debt, the plaintiff had to show something for it; otherwise he was turned over to the limited jurisdiction of the Spiritual Courts. In the reign of Henry II the most simple contracts and debts, for which there was not the evidence of deed or witness, were left to be enforced by the ecclesiastical courts so far as their jurisdiction extended. Glanville (X. 12) writes: "If the creditor has neither pledge nor sureties nor any other proof, unless the mere faith of the other, this will not be received as any proof in the King's Court. Yet he may proceed for the breach or violation of faith in the Court Christian". Grasp of hands was not regarded as a sufficient proof of contract, and the same rule applied to a gage. Glanville (X. 6) says loan is sometimes made

¹*Select Charters* ch. 15.

²*Lib Ass.* f. 101 pl. 70.

upon the credit of putting in pledge. When a loan of this description takes place, sometimes moveables such as chattels are put in pledge. Henry II laid it down as a principle that no men need answer for his freehold without royal writ. In Bracton's time¹ various writs were in use. There were three writs which could not be changed without the consent of the judicial power. They were : (1) *Formata super certis casibus* ; (2) *De cursu* and (3) *De communi consilio*. There were others that could be varied according to the nature of the case. They were known as *Magistralia* ; " A writ is issued when it has been drawn up after the likeness of a rule of law because it expounds and explains the declaration of the party producing it, just as a rule of law narrates briefly the thing which is. It ought not, however, to be so brief as not to contain the reason and force of the declaration. There are some writs drawn up on certain cases granted and approved of the course and of the Common Counsel of the whole kingdom which cannot be changed in any manner without their consent and assent. There are other writs following out of them which are called judicial and are repeatedly varied according to the variety of the pleas of the proponent and the respondent, of the claimant and of the exceptor, according to the variety of answers."

Study of
Writs and
Common
Law.

The Common Law of England has grown round the royal writs. These writs were the most important part of that law which is the sovereign law of the King in the Kingdom². Maitland writes : " Legal Remedies and legal procedure are all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs must be his theme. The scheme of original writs is the very skeleton of the *Corpus Juris*. So thought our forefathers and in the universe of our law books perhaps in the universe of all books a unique place may be claimed for the *Registrum Brevium*—the

¹Bracton fol. 413b.

p. 241; 25 Ed. VII, No 210.

² *Rotula Parliamentarium*

register of writs in the English Chancery¹." That register was first printed in the reign of Henry VIII by W. Rastell, who has collected Original and Judicial Writs. It was first published in 1531; Sir E. Coke, in his preface to 9 Report, says: "The Register is the ancientest book of the law²". Holdsworth³ gives an account⁴ of the growth of the Register of Original Writs⁴.

The Register is commonly compared with the Praetor's Edict, especially with that part of it in which the forms of action were mentioned. The Praetor issued the edict in his own name in Rome and he would publish at the commencement of the year of his office what changes he wished to introduce. The Register was a record of the office and of the legal profession. It prescribed the mode in which action was allowed⁵. The Register of writs is regarded as the foundation of legal learning.

The Year books are the Law Reports of the Middle Ages. Horwood and Pike have recorded the results of their research in the *Roll Series* and Maitland has published Year Books of the reigns of Edward I and Edward II for the Selden Society; in 14 *Harv. L. R.* 557-71 a bibliography of Year Books is given by Charles C. Soule. Pike says⁶, the report of the Commissioners was intended for the use of the legal profession including the judges. It was designed to show the general principles of law pleading or practice. The record was drawn up for the purpose of preserving an exact account of the proceedings in any particular case. The report contains

¹3 *Harv. L. R.* 97.

²See also 3 *Harv. L. R.* which gives account of writs; Reeve's *History of English Law*, Vol. III, pp. 437—441.

³*History of English Law*, Vol. II, Appendix V.

⁴See also III *Harv. L. R.* 113—115; III *Harv. L. R.* 213-216; and III *Harv. L. R.* 170-175; the writs con-

tained in Glanville's Treatise; the writs contained in old *Natura Brevium*.

⁵*Diversite des Courtes*, Tottell's ed. 156 1; The old *Natura Brevium*, the *Novas Narrations*, the *Articuli ad Novas Narrations* and the *Diversite de Courtes* in four tracts.

⁶In 7 *Harv. L. R.* p. 266.

not only reasons eventually accepted but often the reasons or arguments which preceded each and the reasons or arguments for which other pleadings were disallowed. Maitland writes¹: "The spirit of the earliest Year Books will hardly be caught unless we perceive that instruction for pleaders rather than the authoritative fixation of points of substantive law was the primary object of the reporters".

To conclude. The doctrine of Consideration is of Teutonic origin and the Common Law of England was the product of the time peculiar to England. The judges of the Common Law after the fourteenth century recognised no authority in the Roman Civil Law. Though other courts in the Kingdom were influenced by the Civil Law if their procedure was not actually copied from Roman Law, it is quite certain that the Common Law was able to strike out its independent line of development. This was rendered possible by the peculiar writ system which prevailed, and the strong hand of the king. This is made quite clear from the detailed study of the Year Books. Roman Law became a subject of distrust because a quarrel had arisen between the King and Pope. Coke has definitely stated the position which Roman Law occupied in England.

¹In Y. B. 1, 2, Ed. II. (S.S.) XIV.

CHAPTER II.

THE EARLY LEGAL HISTORY OF THE ENGLISH DOCTRINE OF CONSIDERATION.

Action of debt was allowed if the plaintiff claimed to recover a debt that was liquidated and ascertained sum of money alleged to be due to him. Generally it was a result of a contract between two parties or on some facts from which the law implied a contract to have been made between them. In Glanville's time this action of debt was well known. The King asserted that actions of debt or detention of chattels, if in no way connected with marriage or testament, should be brought in his own Court and not in Ecclesiastical Court. The Constitution of Clarendon¹ says: "Pleas concerning debts of the Laity also belong to the King's Crown and Dignity". The writ given by Glanville runs as follows:

The King to the Sheriff. Health.

Command *N* that justly and without delay he render to *R* one hundred Marks which he owes him as he says and of which he complains that he has unjustly deforced him. And unless he does so, summon him by good summoners that he be before me or my justices at Westminster in fifteen days before Easter to show wherefore he has not done, and have there the summoners and this writ. Witnesses, etc. It is to be noted that non-payment of debt is equivalent to deforcement, unjust and forcible detention of money which belongs to the creditor. This shows that debt was very much like a

¹Glanville X. I.

real action. The oldest form of this action was debt-detinue. That action became separated into two actions in the time of Glanville.

Scope of the
Action.

This action was allowed in the following cases : (1) to recover money lent ; (2) to recover the price upon a sale ; (3) to recover rent due ; (4) money due from a surety ; (5) debt confessed by a sealed document. It was used to recover a fixed sum of money if there was a *quid pro quo* or Consideration. The sum to be recovered must be a definite and liquidated amount. This action was not allowed to obtain compensation for breach of contract because there was no fixed and liquidated amount. The defendant had a right of action to wage law on an action of debt ; Statutory penalties, forfeitures under bye-laws and moneys due adjudged by a Court could be recovered by this action of debt¹.

This action is called debt because it is for the recovery of a debt *en nomine* and *in numero*. Though damages are in general awarded for the detention of debt, they are nominal and are not the principal object of the suit, as in Assumpsit and Covenant. In *Rudder v. Price*.. (791 I. H. Bla. 550) Lord Loughborough said "debt is in some respects a more extensive remedy for the recovery of money than assumpsit or covenant, for assumpsit is not sustainable upon a specialty and covenant does not lie upon a contract not under seal, whereas debt lies to recover money due upon legal liabilities² or upon simple contracts express or implied³, whether verbal or written ; and upon contracts under seal or of record and on Statutes by party aggrieved : whereas the demand is for a sum certain or capable of being reduced to a certain sum." In *Walker v. Walter* (Dough 6) Lord Mansfield said : "Debt may be brought for sum capable of being ascertained though not ascertained at the time of the action brought."

¹Chitty on *Pleadings*, vol. I., pp. 121—129.

²*Com. Digest* Debt A. 1.

³*Ibid* Debt A. 9.

On simple contracts and legal liabilities debt lies to recover money lent and paid, had and received, and on account stated for interest due on a loan or forbearance of money. Debt also lies to recover money due on a specialty. The demand must be a certain sum of money. The action of debt on simple contract can be maintained in any court of Common Law against an executor or administrator². Wager of law was abolished on action of debt³. The plaintiff can prove and recover in debt on simple contract less sum than mentioned in the declaration. The declaration in the action, if on simple contract, must state consideration and also legal liability or express agreement, and it must be stated that the defendant agreed to pay the debt. In specialty Consideration need not be shown.

The action of debt assumed that the defendant had received actually money or chattels which belonged to the plaintiff, *e.g.*, services or goods. The writ of debt was like the writ for the recovery of land. The judgment for the plaintiff is that he recovers his debt. The defendant is conceived of as having the goods of the plaintiff. This explains why the duty of the debtor was to pay a fixed sum. In Y.B. 12 Ed. IV 9—22. Brian C. J. said ; “ If I bring cloth to the tailor to have a cloak made, if the price is not determined beforehand, I shall pay for the making and he shall have an action for the making ” In 8 *Hare. L.R.* 260 it is stated for the same reason the *quantum meruit* and *quantum valebant* counts were never classed with common counts in debt and in *Assumpsit* the *quantum meruit* and *quantum valebant* counts were distinguished from *indebitatus* counts. The practice became common to declare in *indebitatus Assumpsit* when no price had been fixed by the parties. In Doctor and Student⁴, it is stated : “ After divers that be learned in the law of the realm . . . if he to whom the promise is made have a charge by reason of the promise, which he

¹ *Com. Dig.*, Debt A.

² 3 Will IV. c. 42 s. 18.

³ Sec 3 & 4 Will. IV. c. 42
14.

⁴ Dialogue II, ch. 24, pp.
241—245.

hath performed, then in that case he shall have an action for that thing that was promised though he that made the promise have no worldly profit by it." In *Edgecomb v. Dee*¹, Vaughan C. J. said: "Contracts of debt are reciprocal grants". A man may sell his black horse, for present money at a day to come and the buyer may the day being come, seize the horse for he hath property in him.

Meaning of
the word
Contract in
Year Books.

The word contract was used in the time of the Year Books in a much narrower sense than it is to-day. It was applied only to those transactions where the duty arose from the receipt of *quid pro quo*: e.g, a sale or loan. In other words, contract meant what we call to-day real contract. What we call to-day the formal contract or specialty contract was anciently described as a grant, an obligation, a covenant but not a contract². Account in debt demanding "part by obligation and part by contract." Again it is stated³ "Now you have founded wholly upon the grant, which cannot be maintained without a specialty for it lies wholly in parol and there is no mention of a preceding contract." By parol the party is not obliged. Thorp C. J. says: "You say truly if he put forward an obligation of the debt, but if you count upon a contract without obligation as here a loan, it is a good plea⁴," debt on a judgment Belknap objected "for there is no contract or covenant between them⁵." In 8 Rich. II.⁶ it is stated that "in debt upon contract the plaintiff shall show cause in his count for what cause the defendant became his debtor; otherwise in debt upon obligation." In Y.B. 39 Henry VI 34 (46) the plaintiff brought his action in the Mayor's Court of London for £200, part of a larger sum of £500 due for sale of cloth, he having agreed to receive the remainder in goods. The defendant offered to wage his law, but the plaintiff urged that owing to the custom of London, he

¹ *Vaughan's Reports*, p. 101.

² Y.B. 17 Ed. III 48 (14).

³ Y.B. 29 Ed. III 25, 26.

⁴ Y.B. 41 Ed. III 7 (15).

⁵ Y.B. 43 Ed. III 2 (5).

⁶ *Bellewe's Cases* ed. 1585, p. 111.

could not, when the plaintiff showed "bill or sealed writing delivered by the defendant in testimony of the contract," and he produced specialty. The case was transferred to the Exchequer Chamber and Laicon J. said: "It seems that the plaintiff should be barred, for he should have sued on specialty and not on the contract." Prisot J. disagreed on the ground that the contract was not merged in the covenant which was a mere testimony of the contract. In Viner's *Abridgement*¹ a full account of pleadings is given. In *Termes de la Ley* (1671, p 181) contract is defined as a bargain or covenant between two parties where one thing is given for another which is called *quid pro quo*. *E. G.* I sell my house for money or if a covenant be to make you a lease of my manor of Dale in Consideration of twenty pounds that you shall give me, these are good contracts because there is one thing for another. But if a man make a promise to me that *A* shall have 20 shillings and that he will be debtor to me thereof and after *A* ask 20 shillings and he will not deliver it; yet *A* shall never have any action to recover this 20 shillings because this promise has no contract but a bare promise and *ex nudo pacto non oritur actio*. But if anything were given for 20 shillings, though it were to the value of a penny, then it had been a good contract. Salmond² writes: "It was laid down that debt on a simple contract lay where and where only the defendant had received something in recompense for the obligation sought to be enforced against him. To this requirement of *quid pro quo* there was one exception, namely, suretyship. Pollock and Maitland³ write: "We may take it as a general principle of ancient German Law that the Courts will not undertake to uphold gratuitous gifts or to enforce gratuitous promises." Note that the statement in English books that the deed imports Consideration is historically not true. Pollock and Maitland⁴ say: "We may doubt whether in the

¹ Vol. VII, under the head of Debt, pp. 324-377.

² *Essays* p. 182.

³ *Hist. of Eng. Law*, Vol. II, p. 213.

⁴ *Hist. of Eng. Law*, Vol. II, p. 214.

thirteenth century a purely gratuitous promise though made in a sealed instrument would have been enforced if its gratuitous character was quite clear. The ordinary bond of this period generally states that there has been a loan of money. The bond is no mere promise, it is a confession of a legal debt. There is all along a strong feeling that whatever promises the law may enforce, purely gratuitous promises are not and ought not to be enforceable." Salmond says: "The idea that simple contract debts were really based on mere agreement was the cause of generalizing different causes of debt as *quid pro quo*¹. In this case debt in common Pleas was brought on an agreement between the plaintiff and the defendant that the plaintiff should marry one Alice, the defendant's daughter and the defendant agreed to pay 100 marks to the plaintiff. The averment was that the plaintiff had married the daughter of the defendant but the money was not paid. Danvers J. said: "The defendant has *quid pro quo*: for he was charged with the marriage of his daughter and by the espousals, he is discharged, so the plaintiff had done what he was to be paid for. So if I tell a man if he will carry twenty quarters of wheat of my master, he shall have 40 shillings, and he carries them accordingly, he can sue me for the 40 shillings and yet the thing is not done for me, but only by my command." So here he shows that he has married and so a good cause of action has accrued to him: it would have been otherwise if he had not performed them. Moyle J². said: "If I tell a surgeon, if he will go to one J, who is ill and give him medicine and make him safe and sound, he shall have 100 Shillings, therefore if the surgeon cures J, he shall have a good action of debt against me for the 100 shillings, although the thing was done for another and not for the defendant himself; if there is not *quid pro quo*, there is what comes to the same thing." It is to be noted that benefit must have been actually conferred. The promise to do so in future is not actionable at all, except in the

¹ *Essays* p. 182.

² Y.B. 37 Hen. VI (1459) pl. 18.

case of contract to sell goods. It has been suggested in 6 *Harr. L.R.* p. 262 that the rule in *George V. Skivington*¹ should be extended to injured persons not specifically in the vendor's mind at the time of sale if such persons were members of the class by whom the vendor intended the article to be used or by whom he might reasonably have contemplated that the article was likely to be used. Such is the decision in *Schubert v. Clark*². Salmond³ writes: "The date of generalisation is difficult to mention with accuracy. But we notice the generalisation mentioned in Y.B. 11 and 12 Edw. III 586 (R.S.). There are references to *quid pro quo* from this time. In Henry VI's reign the generalisation is well known; Y.B. Henry VI 8." Holmes⁴ writes that the modern principle of contract is exactly the same as the principle of *quid pro quo*.

The action of debt was inconvenient because: (1) If money was to be recovered to the representative of a deceased person, action of debt was not allowed. Wager of law was allowed when this action was brought. (2) The plaintiff was bound to show that he owed a *liquidated* and ascertained sum of money, if not he lost his action. (3) Claims for unliquidated damages for executory contracts could not be enforced. So to enforce such contracts there must be a covenant under seal⁵. This was an action for negligence in treatment against a surgeon, alleging that he *undertook* to cure the plaintiff's hand and that by negligence the plaintiff's hand was maimed. There was this difference that it set forth that the plaintiff's hand had been wounded by one *T.B.* And hence it appeared that however much the bad treatment may have aggravated matters, the maiming was properly attributable to *T.B.* and that the plaintiff had an action against him. This was the reason why the defendant relied upon *undertaking*. He took issue on the under-

¹(1869) L. R. 5 Ex. 1, 38

²*Essays* p. 182.

L. J. Ex. 8.

⁴*Common Law*, pp. 255—259.

⁵5 N. W. Rep. 1103.

⁵Y.B. 48 Ed. II pl. 11.

taking, assuming that to be essential to the plaintiff's case and then objected that the writ did not show the place of the undertaking and hence it was bad because it was not quite clear from which place inquest should be summoned to speak to that point. The writ was adjudged bad on that ground. So it is inferred that the defendant's view was right. One of the judges called it an action of covenant and said that "of necessity it was maintainable without specialty, because for so small a matter a man cannot always have a clerk at hand to write a deed."

Owing to the dread of the ecclesiastical courts and interference of equity courts the remedy became more general than before in the King's Court. The Constitutions of Clarendon declared that pleas of debt shall be tried in the King's Court. *Diversiti de Courtis* presided over by ecclesiastical Chancellors laid it down as a rule in 1525 that a man shall have remedy in Chancery for Covenants made without specialty if the party have sufficient witnesses to prove the Covenants¹. In Y. B. 8 Edw. IV. defendant had promised *per fidem* to indemnify the plaintiff and did not fulfil his promise. The plaintiff sued by writ of Subpoena in Chancery. The Chancellor said there must be a deed or court Christian should try the case. This case shows the relation between ecclesiastical and equity courts.

Before Common Law Procedure Act, 1852, it was necessary to specify in the writ the particular form of action adopted, and the form of declaration varied. When framed in debt the declaration stated the debt and averred that by reason of the non-payment of the debt, action accrued. In *assumpsit* the declaration stated that the debt had to be paid (*indebitatus assumpsit*) and that there had been breach of that promise. Such a promise may be one for which law would cast obligation on the defendant to pay the debt. There is now one form of *indebitatus* count since C.L.P. Act of 1852. Special counts in actions on contract are abolished.

¹Kelly's *Equity*, p. 88.

The simple contracts are described by the words "promised," "agreed," "guaranteed," "bargained," etc. In *Deacon v Gridley*, (1854 15, C.B. 303). Maule J. said: "It was necessary to succeed upon this demurrer to go further and to say that the count in question does not contain what the other three do contain—a promise to pay." "The most anxious endeavour and hope of every future day shall be to prove my regard and gratitude in the only way in which the world esteems the proof, by restoring to you all that I owe." This is not equivalent to promise to pay.

In *Bryant v. Herbert* (1878 3 C.P. Div. 389) action was to claim return of picture or its value and damages for its detention. The plaintiffs got a verdict of £10, being its assessed value and one shilling for detention. In the Court of Appeal it was held that the action was founded on tort within the meaning of 30 and 31 Vict. C. 142, s. 5 and the plaintiffs were entitled to their costs. Brett L.J. said (p. 392): "The conclusion to which I have come is this that the action of detinue is technically an action founded on contract. The action was invented to avoid the technicalities of the old law; the intention was to state a contract which could not be traversed. Therefore I think the action of detinue or the form of action of detinue *so far as the remedy is concerned in its legal signification was founded on contract.*" When persons are sued in detinue for holding goods to which another person is entitled, the real cause of action in fact is a wrongful act and not a breach of contract and the remedy sought is not a remedy which arises upon a breach of contract. In Y.B. 12 Ed. III. 587 (R.S.) an attorney sued in debt for arrears of salary, alleging a covenant engaging him for ten years at twenty shillings a year. The defendant's counsel objected, by saying: this count begins in covenant and ends in duty; judgment of such a count is not warranted. He was overruled. He again objected on the ground that there was nothing to show a covenant. But Scarshulle J. said: "If a man counted simply of the grant of a debt, he

would not be received without specialty ; but here you have his service for his allowance which lies in cognizance and you have *quid pro quo*." In (1459) Y.B. 37 Hen. VI. 8 pl. 18 a similar point was raised. Prisot C.J. added that in the case of goods sold, though not of land, the buyer might take the goods ; this follows from the theory of reciprocal grants.

We have seen that the writ of debt was not based upon any idea of contract at all ; it was used to enforce a *duty* against defendant. It contemplated a duty on his part of which the plaintiff had a right to exact fulfilment. Holmes¹ says : "The old debts were not conceived of as raised by a promise²." They were a *duty* springing from the plaintiff's receipt of property, a fact which could be seen and sworn to. Pollock and Maitland say³ : "No pleader propounding an action of debt will think of beginning his count with whereas the defendant promised to pay." He will begin with "whereas the plaintiff lent (or as the case may be) sold or leased to the defendant." "In short he will mention some cause *debendi* and that cause will not be a promise." Glanville (X. 3) writes : "Both parties being present in court, the plaintiff may found his demand on a variety of causes. His debt may arise either upon a lending or a sale or a borrowing or a letting out, or a deposit or from any other just cause inducing a debt. Ames⁴ writes : "The writ in debt like writs for the recovery of land was a *praecipe quod reddat*" The judgment for the plaintiff is that he recover his debt. In other words, as in the case of real actions, the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep but ought to surrender. Thus it is quite clear that in the theory of law the action of debt was regarded as delictual and not contractual. Fitzherbert's *Natura Brevium*⁵ deals with writ of debt⁶.

¹ *Common Law*, p. 264.

² 8 Harv. L. R. 260.

³ Bro. Act. Sure le Case pl. 5.

⁵ Vol. I, 119-122.

⁴ *Hist of Eng. Law*. Vol. II. p. 212.

⁶ Comyn's *Digest*, Vol. III. tit. "Debt."

This action lies where a party claims damages for breach of Covenant, namely of a promise under seal. It was useful to protect termor, and was the only remedy of lessees. In the thirteenth century the use of sealed writings was common. A religious significance was given to seals. It was never allowed to sue in Covenant if debt was to be recovered, even if seal were attached. It was a remedy given for recovery of damages when a contract under seal was broken. It differs from actions of assumpsit and debt. Assumpsit, though it is for the recovery of damages, is not sustainable where the contract is under seal. Action of debt is allowed upon a simple contract, a specialty, record or statute only, when the demand is for the recovery of a sum of money in numero and not where the damages are unliquidated and cannot be ascertained. Covenant and debt are concurrent remedies for the recovery of any *money* demand where there is an express or implied contract in an instrument under seal to pay it. Debt is generally a better remedy because judgment is final at once, if the defendant does not plead. Covenant is peculiar remedy for the non-performance of a contract under seal where damages are unliquidated and depend upon the verdict of the jury for the amount. In lease if covenant is broken it is better to bring action of covenant for general damages than to bring action of debt for a fixed sum: also general damages will not be awarded in debt, but in covenant they will be.

To succeed in an action of covenant there must be a promise under seal, but if it is a parol contract, action of assumpsit will lie. The right to sue in covenant depends upon the deed being executed, so all that it is required to prove at the trial is the production of the deed and acceptance of that deed by the covenantee. If any person is intended to benefit by the deed, his name must be mentioned in it. The declaration must state that the contract was made under seal and it is not necessary to mention the Consideration and if there is any precedent condition to be performed before the deed

operates, it should be stated in the declaration that such condition has been fulfilled. Judgment is that the plaintiff do obtain a sum named which is for the damages sustained owing to the breach of the contract.

Bracton identifies the principle in writing with the stipulation on which the action of covenant is allowed. It is not quite settled that the writing on which an action of covenant could be brought must be under a seal. In Y.B. 21-22 Ed. I. p. 111 it is said that an action of covenant will lie for not building a house.

In Y.B. 21-22 Edw. I 183 a Prioress has covenanted to provide a chaplain to sing the service in the plaintiff's chapel. But even here there is a chantry of which seisin is alleged. Y.B. 20-21 Edw. I p. 223 relates covenant to return a horse that has been lent or to pay £20. There is doubt whether 'suit' will support an action of covenant while it will support an action of debt. In Bracton we have a covenant that plaintiff and his wife may live with the defendant and that if they wish to depart, he will cause them to have certain lands¹. Another covenant is that the plaintiff may have a hundred pigs in a certain wood. But here the plaintiff seems to be claiming a profit². Warranties or agreements of a similar kind seem to be occasionally enforced by a writ of covenant. In Edward's reign the plaintiff had the option to sue either by action of debt or covenant. In 6 *Harv. L.R.*, p. 400, it is stated at any rate that almost all the recorded cases on covenants of the thirteenth and early fourteenth centuries appear to relate to interests in land. Judgment might be for the recovery of seisin, where power of reentry for breach of covenant was expressly given in a lease. In Y.B. 20 and 21 Edw. I (R.S.) 222 (Debt) absence of a writing is unsuccessfully pleaded in debt; in Y.B. 30 and 31 Edw. I (R.S.) 158, 1302 A.D. seal is absent: plaintiff produced two writings indented made between the proctor and himself (but without seal). Bracton has cases where the

¹*Note Book*, Vol. III. p. 87,
case 1058 (Sussex) 1225 A. D.

²*Ibid.* p. 148, case 1129
(1234 A.D.).

point is quite open¹. But there is a case of the year 1234 where an action of covenant was not allowed because the plaintiff did not produce any deed². The following case is recorded (Easter 1234)³. W.E. sues the Abbot of Evesham because he holds by covenant from him. The plaintiff counts that the Abbot came before the justices of eyre, granted the plaintiff an elaborate corody and further granted that he would execute a deed embodying this concession; suit is tendered and no appeal is made to any record. The Abbot confesses the conventio, denies the breach and wages his law.

In Y.B. 21-22 Ed. I p. 621 defendant sets up an agreement by way of defence; on being asked to prove the covenant, he appeals to the country.

32-33 Ed. I 297 shows very close contact between the covenant and the lease. An action of covenant was brought against tenant *pur autre vie* for wasting tene-ment; he demanded judgment as the plaintiff had nothing to prove the covenant or the lease. That answer was not satisfactory. In Y.B. 32-33 Edw. I, 201 a writ of covenant is brought against a termor, who is holding beyond his term; he promised to execute a written agreement, but he has not done so; the defendant at first relies on the want of a specialty but is driven to claim a freehold. In Y.B. 33-35, Edw. I. pp. 127, 331, this rule is laid down "that what is done by a deed can be in general undone by deed." Bracton, f. 101, asks: "Do you hold to have been received by you whatever I owe to you from whatever cause?" It is answered, "I so hold and regard it as received." And an acceptilation may be made for a part of a debt as for the whole and all things which by any means are brought under a stipulation may be got rid of by an acceptilation. Moyle in his commentary on Justinian, Book III, Ch. 29, p. 451, says: "An

¹Note Book, Vol. II, p. 687,
No. 890; Vol. III, p. 148.
Case No. 1129.

²Hon. * III, Record Office
Curia Regis Roll, No. 140,
m., 15d.

³Record Office, *Curia Roll*,
No. 115, m. 7.

obligation is dissolved by the untying of the knot, by the tying of which it was imposed ; the general term employed is *solvere* meaning releasing. *Acceptilatic* is a formal release from an obligation incurred by stipulation." Ames in IX *Harv. L.R.* p. 49 writes : " It has been often said that a seal imports a Consideration as if a Consideration were as essential in contracts by specialty as it is in parol promises. But it is a mistake. Specialty obligation owes its validity to the mere fact of its formal execution." The true nature of a specialty as a formal contract is explained by Bracton (f. 100 b) as follows :—

" These kinds of stipulations and obligations have been invented that each may have and acquire for himself what interests himself, if he acts contrary to what has been brought under the stipulation. And if the thing made subject to the stipulation is given to another, it will nevertheless interest the stipulator, for he who has promised, will be bound to the amount of his interest or for a penalty, if a penalty has been brought under the stipulation. But a person is obliged by a writing, as, if a person shall write that he owes money to another, whether the money has been paid to him or not, he is bound by the writing nor can he object that the money has not been paid in the face of the writing, because he has written that he owes it, and a person is obliged not only by words but by writing and letters, etc." Bracton's statement is confirmed in Y. B. 45 Ed. III. 24 (30). The facts were that the action was a debt upon a Covenant to pay £100 to the plaintiff upon the latter's marrying the defendant's daughter. It was objected that this, being a debt upon a Covenant about marriage, was within the jurisdiction of a spiritual court. But the Common Law judges gave judgment for the plaintiff because there was a deed. The specialty being the Contract itself, the loss or destruction of the instrument would logically mean the loss of all the obligee's rights against the obligor. In Y.B. 27 Hen. VI. 9 (1) Danby J. said : " If one loses his obligation, he loses his duty." In Y.B. 24 Edw. III 24 (1) Shardelowe J., Stonore C.J. and Willoughby J.

said : " Where the action is upon a specialty, if the specialty is lost, the whole action is lost." The technical plea in deed was : " I did not execute that document."

Before the end of the reign of Edward I it was ruled in the King's Court that the only *Conventio* that could be enforced by action was one expressed in a written document sealed by the party to be charged therewith. Henceforth *Conventio* and Covenant denote a sealed document. The King's Court refused to give validity to old forms such as grasping the hand. The action of Covenant was invented to protect lessees of land. The term of years cannot be created by word of mouth or simply by delivery of possession. The man who relies on a Covenant must produce specialty. A sealed parchment was regarded as binding. That was the mode of giving effect to the intention of the parties. Maitland¹ mentions an action of the Fair of St. Ives A.D. 1275. The master sued his servant for leaving his service. The servant admitted the breach. Judgment was that the servant should serve the master according to the term agreed. Note that there was no written document produced. Maitland in Court Baron (S.S.) says that some of these entries as well as some of those which follow seem to raise the important question whether long years before King's Courts had developed the action of assumpsit as an action for the enforcement of agreements not under seal, the local courts were not enforcing such agreements. The agreements enforced at Littlepot are called Conventions ; there is reason to believe that in larger towns unwritten Covenants were commonly enforced².

The English formal contract is not the product of an ancient myth but is based on facts. Maitland says :

¹*Select Pleas in Manorial Courts*, s.s. 158.

²For Nottingham see *Records of Nottingham* 1. 161, 167, 207, 1-161 "Pleas relating to the repairing of a Pyx of the Priory of Lenton, 1355, April."

1-167 "Plea as to the engagement of a Packer of Wool 1357 Oct. 11,"

1-207 "Pleas regarding the repair of Cow Lane, 1379, March 30."

“ The act and deed that is chosen is one that in the past men of the highest rank had the privilege to use.” The use of seal is derived from the Kings of the Franks. The seal was in use during the Norman Conquest. A seal was first affixed to writs. Seal became of general use in the 13th century. The act of sealing was powerful evidence. The man was estopped from denying his own sealed document. The charters of feoffment were common in the days of Bracton and they contained clauses of Warranty. Later on leases for years and documents creating rights of pasture and easements were frequent. At first those charters were used for public purposes to bind parties. Italian bankers made frequent use of bonds. The debtor states that he is bound to pay money lent and agrees to repay the money within a fixed time. The rate of interest is also mentioned. Sometimes the debtor agrees to pay the sum lent to the creditor or his agent. The reason why a sealed writing had great probative effect in a court was because it was irrebuttable evidence that the person was bound and it was conclusive proof that the liability to the plaintiff had been incurred. A duty was created to pay a fixed sum of money to the plaintiff. The proper action was debt. If it was unliquidated damage for the breach, action of covenant was the proper remedy. The party who seals and delivers a deed witnessing an obligation, does not strictly create it but actually declares himself bound and that declaration is conclusive as against himself. The party had recorded his own promise in solemn form.

The very object of the Anglo-Saxon writing under seal was to dispense with any other kind of proof and to substitute that record as the expression of the will of the parties. The contracting party is estopped from denying the liability. The deed itself is irrevocable and requires no confirmation. Now in the American States a deed does not possess the ancient qualities. In Y.B. 39 Hen. VI. pl. 46, Prisot J. said: “ The contract is not merged in the Covenant, which is merely testimony of the contract.” In Y.B. 6 Hen. IV. 8 (34) (1405)

Hankford J. said : " In writ of Covenant he will recover damages for each Covenant broken, in which case he ought to declare for certain in what points each Covenant is broken." These two cases show clearly that an unliquidated sum can be claimed in action of Covenant. Ames¹ says : " Strange as it may seem, Covenant was not the normal remedy upon a Covenant to pay a definite amount of money or chattels. Such a Covenant was regarded as a grant of money or chattels, debt was the appropriate action for their recovery." In Anon² it is said " If one Covenant to pay me £100 at such a day, an action of debt would lie ; a *fortiori*, when the words of the deed are Covenant and grant, for the words Covenant sometimes sounds in Covenant, sometimes in Contract." The King's Bench allowed either Covenant or debt, to be brought as early as 1585, but the Common Bench did not adopt this practice till the reign of Charles I. Holdsworth³ says : " This procedural rule shows us that the obligation of Covenant rests on the duty imposed by parties by writing down their intention in such a way that the contents of that writing cannot be disputed and the party cannot deny his obligation." When the procedural rule has been used to give effect to sealed writing the deed is recognised to have an effect of its own without regard to what the parties may have really intended and Covenant instead of being regarded as a matter of proof becomes a peculiar promise, and to prove this promise a distinct action of Covenant was required. But when once this conclusion is reached, it is a short step to holding as a matter of law that a " deed " has operative force of its own which intentions, say Pollock and Maitland, " expressed never so plainly in other ways have not." The sealing and delivery of the parchment make up the contractual act. Further, what is done by " deed " can only be undone by " deed ". In Y.B. 45, Edw. III, 24 pl. 30, a contract under seal was

¹ *Law Magazine and Review* Reports, p. 208.
No. XXV, p. 294.

² 1591, 32 and 33 Eliz. in III, p. 324.
Communi Banco, Leonard's

³ *History of English Law*, Vol.

a promise of a distinct nature for which a distinct form of action was provided. Holmes¹ writes: "A charter was simply a writing. As few could write, most people had to authenticate a document in some other way, *e.g.* by making a mark. This was in fact the universal practice in England until the introduction of Norman customs. With them seals were commonly in use. But at first they belonged to kings and very great men. An authentic unsealed charter was as effective as a sealed one. It was evidence either way." Bracton (F100 b 59) says: "If a person shall write that he owes money to another, whether the money has been paid to him or not, he is bound by the writing, because he has written that he owes it." In Y.B. 33 Edw. I. R.S. 356 the defendant had to admit the deed or deny it. The defendant admitted the debt. In Y.B. 39 Hen. VI. 34, pl. 46, Prisot J. said: "The contract was not merged in the Covenant but was merely testimony of the contract." In Shepard's *Touchstone*² it is stated that the agreement must be written on parchment (vellum) paper. Fitzherbert, 1221, says: "If a man make a tally and make bond thereon, and seal and deliver it as his deed, yet it shall not bind him, but he may plead against the same that he owed him nothing or wage his law. For an obligation ought to be made in writing in parchment or paper and not be written upon any piece of wood as a tally is." In Year Books we find cases in which it is attempted to show that sealed tallies are deeds. It was so regarded by the custom of London. Those tallies were both notched and written upon³. In Y.B. Edw. I (R.S.) 456, one *A* brought a writ of debt against *B* and offered suit. *B* asked if he had anything besides the suit to prove the debt. *A* put forth a tally. *B* denied tort. Mettingham: "He who demands this debt is a merchant; and therefore if he can give a slight proof to support his tally, we will incline to that side and we will

¹ *Common Law*, p. 271.

³ Y. B. 44 Edw. III 21,

² By Preston, Vol. 1 p. 54.

pl. 23.

take it." Gosefeld:—"We are here at Common Law. Metingham:—"Every merchant cannot have a clerk with him; therefore I will do as I have seen other judges before us do."

These cases show that it was not necessary to prove Consideration in Covenants. The man was estopped from disputing his own writing. Holmes¹ says: "It is not quite correct that a Covenant is a formal contract because in every contract if anything more than the mere expression of the promisor's will be required, it is form. Consideration is a form as a seal. The only difference is that one form is of modern introduction and has a foundation in good sense, whereas the other is a survival from an older condition of law. In many states it is held that a mere scroll or flourish of the pen is a sufficient seal."

Many instruments under seal were contracts and yet there was no Consideration. The tendency to generalise the law of contracts by saying that every contract has Consideration has led to the fiction that a deed imports Consideration. A deed does nothing of the kind. English Law, speaking generally, requires that a contract must have a seal or a Consideration. You might as well say a Consideration imported a deed as that a deed imported a Consideration. It is best to say that a party who seals and delivers a deed witnessing his promise does not thereby create an obligation, but he simply declares himself under an obligation to carry out the agreement, and that is conclusive against him in the absence of fraud or any other such defence. Thus we see that the party by recording his consent to an offer in a solemn form is estopped from denying his consent. In the Anglo-Saxon period the great object of writing under seal was to dispense with proof of any other kind.

The action of Covenant was devised to give a remedy to a termor who held land on tenure of long years. The *placitum Conventiones* was like the modern case on a lease. The termor had formerly no possession or seisin

¹*Common Law* p. 273.

of the land but merely benefit of agreement. The termor was protected by writ of Covenant and as leases for years were granted, this action was frequently brought. Family settlements were made by way of feoffment and refeoffment. In the writ we find the law mentioned and judgment awards the land to the suitor. In Glanville's book there is not any writ of Covenant, but in the Rolls of the King's Court such writs are given¹. The earliest recorded Plea Roll of writ Covenant is of the year 1194. Maitland² gives writ of Covenant relating to Lincolnshire Eyre of year 1202. In his register of writs Maitland also mentions it as a writ for mesne³. It was issued as a matter of course when the annual value of the land was worth not less than 40 shillings in the time of Henry III. This writ became popular because any man could employ it when he wanted to convey land by way of fine. There was another writ of *warrantis cartae* employed for similar purpose, and it was its great rival.

The Statute of Wales, 1284, clearly shows that the termor had a real right in the land in certain cases only and for breach of other Conventiones the remedy was damages. In action of Covenant sometimes immovable and sometimes movable property could be demanded. The writ was very flexible. Bracton (f. 34) says "Although it is not allowable for any of the parties to recede from Covenants it is not usual to impose any restriction on the court of our Lord the King to discuss private Covenants of this kind." In Y.B. 21-22 Ed. I (R.S.) p. 111, it is stated that an action of Covenant will be for not building a house. In Y.B. 21-22 Ed. I (R.S.) 183, a Prioress has covenanted to provide a chaplain to sing service in plaintiff's chapel. These cases show that action of Covenant was used to recover movables also. The action of Covenant cannot be used to recover debt, even though that debt be proved by a sealed writing.

¹See *Pipe Roll Society*, 53.

³7. *Har. L. R.* 113—115

²*Sleet Pleas* (s.s.)

A debt must arise from a loan or sale. In Y.B. 20-21 Edw. I 142 the plaintiff had the choice between debt and Covenant. Ames¹ states that "Covenant was not the normal remedy upon a Covenant to pay a fixed sum of money or chattels. Such a Covenant was regarded as a *grant* of money or chattels. Debt was the proper action for recovery. There is hardly any case, before the 17th century in which plaintiff succeeded in an action of Covenant where the claim was for a certain sum."

If the contract is by deed and the Covenant is to do anything else than to pay a sum of money, the action will lie in Covenant. If the broken contract is a simple contract or promise, express or implied, to do anything except make payment of money, the action will be assumpsit. In some cases arising out of agreement between the parties, the return may involve a Common Law duty and the same act or default may be viewed either as a breach of the promise, for which action of assumpsit was proper remedy, or a breach of duty arising from Common Law, and action on case may be the proper remedy. Thus we see that the action of Covenant has the power to develop a remedy for executory contract. The defence urged on this action is that there is no sealed writing. This action becomes contractual because if unliquidated damages be claimed for breach of an executory contract, this action must be brought². In Sheppard's *Touchstone*³ it is stated that "the most frequent use of a Covenant is to bind a man or his heirs to do something in *future* and therefore it is for the most part executory and if the Covenantor do not perform it, the Covenantee and his representatives and assigns may have thereupon an action or writ of Covenant against the Covenantor so often as there is any breach of Covenant". Writs of Covenant are of two kinds; personal and real; a real thing as lands and tenements can be recovered by

¹ 2 Harv. L. R., 56.

144—147.

² Fitzherbert's *Natura Brevium*, Vol. II, pp.

³ By Preston, Vol. I., p. 161.

real writ of Covenant¹. In Viner's *Abridgement*² the difference between real and personal Covenant is given³.

Covenant is to stand seised to Uses⁴.

The study of the writ of Covenant shows that the general theory of contractual obligation has not been fully developed. This action marks the first step in advance of English jural ideas from debt (which was partly contractual) to the complete contract from agreement. There was a restriction of seal in action of Covenant and Lord Mansfield⁵ said: "I take it that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration and the statute of Frauds proceeded upon the same principle. In commercial cases amongst merchants the want of Consideration is *not* an objection."

Action of
Account.

This action was allowed at Common Law against a guardian in socage, and a bailiff and a receiver to compel him to render an account of what they had received and expended in their office. A joint-tenant, tenant-in-common, a partner may demand account against the other by means of this action⁶. This action was very lengthy and expensive. The plaintiff preferred to sue in debt or assumpsit for money had and received. Langdell⁷ states that this action was obsolete in modern times

¹Viner's *Abridgement*, Vol. VI, pp. 374—472. Title "Covenant" (1792).

²*Covenant G.* Vol. XXVI, pp. 388-389.

³See also Bacon's *Abridgement*, 1832, tit. "Covenant", Vol. II, pp. 336—383. Comyn's *Digest* (1822), Vol. III. "Covenant" pp. 261—293.

⁴*The Law of Uses and Trusts*, by Gilbert, s. 105, p. 224, 3rd Ed. by Sugden (1811);

Bacon's *Abridgement* (1832) by H. Gwillim, Vol. VIII, pp. 172—311, C. E. Dodd deals with several kinds of Conveyances to Uses, pp. 191—208.

⁵*Pillans v. Van Mierop* (1765), 3 *Burrow's Reports*, p. 1670.

⁶*Registrum Brevium* of 1687 A. D., p. 135; Fitzherbert's *Natura Brevium*, Vol. I., pp. 116—119.

⁷*Harv. L. R.*, p. 243.

except as between tenants in common. Lindley¹ says :
 "The common order does not entitle the person in whose favour it is made to inspect by a professed accountant specially appointed for the purpose ; but if there is any necessity for so doing, a special order for inspection by such a person will be made²."

The action of account was in the nature of a writ of right and was founded on duty and not on a promise. In this case the plaintiff claimed an account while in debt a sum was demanded. In Core's case (1536, 1 Dyer 20) it was held that debt lies against the administrator of one who gave a bill, undertaking to lay out money in goods to be shipped for plaintiff, but who never executed his commission. If the money had been employed, debt would not lie. It is clear law that no action lies against an executor or administrator, for the law does not intend them to have been privy to the account. Therefore the judgment was good in debt (p. 23 A). *Arnold v. Webb* [1814, 5 Taunton 432 note, (a)] before Bampton J. was an action of assumpsit for the balance of account. Held that whatever doubt there might have been upon the subject a century back, the action of assumpsit for the balance due had been so long established that it was too late to make objection.

The action of trespass is allowed when a party claims damages for a trespass committed against him. A trespass is an injury committed with violence. That violence may be actual or implied. The term trespass includes generally every description of wrong³. The action on the case has been usually called trespass on the case. Technically the word trespass signifies an injury committed *vi et armis*. Blackstone states that all civil injuries are of two kinds : (1) Without force or violence, *e.g.* slander, breach of contract ; (2) Coupled with force and violence, *e.g.* batteries, or false imprisonment. The

Action of
Trespass.

¹*Partnership*, ed. of 1912, p. 582.

²See *Lindsay v. Gladstone* 9 Eq. 132.

³*Wilson v. Knubley* (1806) 7 *East's Reports* per Lord Ellenborough ; and *Peytoe's case*, 9 *Coke Reports*, 78 A.

latter species savours of something of a criminal nature being always attended with some violation of the peace for which in strictness of law a fine ought to be paid to the King, as well as private satisfaction to the party injured. Blackstone¹ states that "if final judgment be for the plaintiff, it is considered that the defendant be amerced for his wilful delay of justice in not immediately obeying the King's writ by rendering the plaintiff his due are be taken up to pay fine to the King in the case of forcible entry²." The words *contra pacem* should be mentioned along with injury and are generally material to the foundation of the action. An action of trespass to land not within the King's dominions could not be brought because King's writ could not run outside his own dominions. In John's reign we notice instances of actions of trespass. But the writ of trespass became writ of course at the end of Henry III's reign. There were many varieties and the writ was variable to suit different cases. In all of them there is an element of unlawful force. This writ is gradually used to protect possession of termor when he is violently evicted. Fitzherbert's *Abridgement in Pasch* (1382) 6 Rich. II is mentioned *Ejectione Firme* pl. 2. The plaintiff by this writ gets damages but not possession of the land. In *Pasch* (1467) 7 Ed. IV pl. 16, the plaintiff was able to recover possession by this writ of trespass. Mich (1481) 21 Ed. IV f. 11, pl. 2 held that possession could be recovered. In Y.B. 14 Hen. VII it is finally settled. Fitzherbert³ gives a case in which it was held that if *H* had survived *F* and had entered into the land and had been seised of the land for term of his life and then had died, then the said *B* should not have a writ of a foredom in reverter, but a writ of entry at *terminum qui praeteriit*. But if *H* had not entered into the land after the death of *F*, then *B* ought to have had a writ of entry in *consimile casu* during the life of *H* and after the death of *H*, a writ

¹ *Commentarice*, Vol. III, volume.
p. 398.

³ *Natura Brevium*, Vol. II,

² See specimen of writ in p. 220.
appendix No. 2 s. 4 to that

of entry *ad communem legem*. This action of trespass was allowed when injury was committed by force to the body or land or chattels. Trespass to body resulted in assault and battery. Trespass to goods gave the action of trespass *de lionis asportatis* and damages were given though the goods were not ordered to be returned. Holmes in *Common Law* says "The test of the theory of possession which prevails in any system of law is to be found in its mode of dealing with persons who have a thing within their power but who do not own it or assert the position of an owner for themselves with regard to it" "bailees in a word". The writ of *consimili casu* extended the action of trespass. The mention of wrongful application of force is dispensed with and even the words *vi et armis* are not inserted in this writ. This gradually gives rise to a new form of action called case, in 1503 a process of *capias* is given in actions upon the case. Fitzherbert in *Natura Brevium* treats of action *sur la case* as quite distinct from action of trespass¹.

The law of negligence is developed under the influence of action on the case. In 1694 Statute 5 and 6 William and Mary c.12 enacted that from henceforth no writs commonly called *capias pro fine* in any of the actions of trespass, ejectment, assault or false imprisonment in any of the said courts should be sued out or prosecuted against any of the said defendants or any other process thereupon.

This action of trespass was allowed where any kind of wrong was done with violence and force. It is the source from which the action on the case and assumpsit were gradually developed. In the beginning the King's Court did not take cognisance of trespass and the remedy was by a criminal appeal, wager of battle, or plaint in an inferior court. By the time of King John's reign writs of trespass began to appear in the records. Pollock and Maitland² write, "Though early precedents may be found for it, this fertile mother of actions was only

¹Vol. I. pp. 92—95 and 85
—92 deal with these actions.

²*Hist. of Eng. Law*. Vol. II.
p. 525.

beginning her reign in the last years of Henry III. Her progeny throve and multiplied until a time came when the older forms having been neglected, an action for damages which traced its descent from the *breve de transgressione* seemed to be almost the only remedy offered by the Common Law." In the reign of Edward I we find the writ of trespass introduced into the *Registrum Brevium*. *Scott v. Sheppard*, 2 *Blackstone's Reports* 392, is a case for trespass and assault for throwing, casting and tossing a lighted squib at the plaintiff and striking him therewith on the face and so burning one of his eyes that he lost the sight of it. Blackstone J. (p. 894) points out the distinction between action of trespass and trespass on the case: "Where the injury is immediate, the action of trespass will lie; where it is only consequential, it must be an action on the case." Fortesque¹ J. said: 'Trespass will not lie for procuring another to beat me; if a man throws a log into the highway and in that act it hits me, I may maintain trespass because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case; because it is only prejudicial in a consequence of which originally I could have no action at all.'

Reynolds J. said: 'The distinction is certainly right; this is only injurious in its consequence for it is not pretended that the bare fixing a spout was a cause of action, without the falling of any water, the right of action did not accrue till the water actually descended and therefore this should have been an action upon the case.' The Chief Justice De Grey said: 'This case is one of those wherein the line drawn by law between actions on the case and actions on trespass is very nice².' In *Covell v. Laming* 1 Camp. 697 it was held that a mere detainer of goods (by looking them up and refusing access to them) was held to be no trespass. In *Morten v. Hardern* and two others (4 B and C 224) the facts were these. The case had three defendants, proprietors of a stage coach.

¹ *Reynolds v. Clarke*, *Comyn Digest* Vol. VI *Strange's Reports*. Vol. I. p. 634. "Pleader, pleadings in trespass," pp. 532—566.

The declaration stated that the defendants so carelessly managed their coach and horses that the coach ran against the plaintiff and broke his leg. It appeared in the evidence that one of the defendants was driving at the time when the accident happened. The jury found that the accident happened through his negligence. Held action on case could be brought against all the proprietors, the plaintiff could have sued that particular driver in trespass. Bayley J. has given an historical account. He said: "It was long a *vexata questio* whether case could be brought when the defendant was personally present and acting in that case which occasioned the mischief. Early in my professional experience, case was the form of action usually adopted for such injuries." In Lord Kenyon's time a doubt was raised upon the point and he thought that where the act was immediately injurious, trespass was the only action that could be maintained for that injury. *Leame v. Bray* was an action of trespass. On the trial Lord Ellenborough thought that it should have been on the case, but on further consideration this court was of opinion that trespass was maintainable, but they did not decide that an action on the case would have been improper. Looking at the other cases on the subject, it is difficult to say that an action on the case will not lie for an injury sustained through the negligent driving of a coach, although one of the proprietors was the person guilty of that negligence. *Ogle v. Barnes and others* (8 T.R. 188) was a case of negligently steering a ship.

The declaration alleged that the ship was under the care of Barnes, one of the defendants, and of certain servants of the defendants, and that through their negligence the injury was sustained. It was urged that the action should have been trespass and not case, because one of the defendants was on board and on the ground of the injury being immediate. In *Rogers v. Imbleston*, 2 N.R. 117, it was alleged that the defendant was driving a cart, and took such bad care of the horse and cart that it ran with great force against the plain-

tiff's horse. To that there was a demurrer upon the authority of *Leame v. Bray*, the action being in case but the court was clearly of opinion that the case would lie and the demurrer was overruled. In *Huggett v. Montgomery* 2 N.R. 446 although the defendant was on board, yet the ship was not under his immediate care and management, but under that of a pilot and on that ground case was held to be the proper form of action. It is not necessary to say that trespass could not in this case have been sustained against Hendorn : no doubt action lies when an injury is inflicted by the wilful act of the defendant ; but it is also clear that case will be where the act is negligent and not wilful. *Moreton v. Hardern* decides that where injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case notwithstanding the act is immediate, so long as it is not a wilful act. Bramwell¹ B. said : " If the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decision." Denman² J. accepted the view of Bramwell B. about the difference between the form of these two actions.

The declaration in this action should contain a concise statement of the injury complained of, whether to person or property and should allege that such injury was committed *vi et armis* and *contra pacem*. The pleadings required that in actions of trespass *quare clausum fregit* the close or place in which the entry took place must be designated in the declaration by name or description, in failure of which the defendant might demur specially. The same rules also affect the pleas and other pleadings.

¹*Holmes v. Hather* L. R. 10 Ex. 261.

²In *Stanley v. Powell* L. R. 1 Q. B. D. 93.

3 and 4 Will. IV c. 4 S. 21 enacted that defendant should be allowed to pay money into court in certain personal actions by judge's order.

Broadly speaking, there is no remedy in King's Court on an informal executory agreement. Ames¹ states that "Prior to the appearance of assumpsit, the contractual remedies in English Law were Debt, Detinue, Account and Covenant. Detinue and Account were based on real contracts. Covenant would be only upon sealed instruments, that is, formal contracts. If therefore parol undertakings other than real contracts were ever recognised in early English Law, they must have been enforced by action of debt. But no instance of such an action in the royal courts it is believed can be found." The ecclesiastical courts were occupied in enforcing suits *pro latione fidei*² as defined by Constitutions of Clarendon. It would appear that in practice the ecclesiastical courts continued to exercise a wider jurisdiction over affairs of common temporal life, including the fulfilment of promises, than could be justified even by a liberal construction of the statute *Circumspecte Agatis*. Coote³ says: "On the broad suggestion of breach of faith the ecclesiastical judges also exercised the power of revising all unconscionable contracts and transactions, although otherwise in no way connected with the jurisdiction of the church." From Hale's *Collection of Cases* it appears that the practice was carried on in the sixteenth century also.

' When a person has received an injury, writes Black- Writ Cursu. stone, and wants redress, he must purchase by paying a stated fee an original writ from the Court of Chancery, which is the shop or mint of justice wherein all writs of the king are framed. It is a mandatory letter from the king in parchment, sealed with his great seal and directed to the Sheriff of the country, wherein the injury is

¹ *Essays in Anglo-America Legal History*. Vol. III, pp. 304-305.

² 6 Harv. L. R. 403 Note.

³ *Practice of Ecclesiastical Courts*, 1847, p. 95.

committed or supposed to be committed, requiring him to command the wrong-doer or party accused to do justice to the complainant or appear in court and answer the accusation¹.'

In personal actions the parties are called plaintiff and defendant and in real action the parties are called the demandant and tenant.

Original writs differed from each other in their tenor according to the nature of the plaintiff's complaint. As society became more civilised cases of injury increased in number and it was not possible to provide a remedy beforehand. Hence the Statute of Westminster (II 13 Ed. I.c. 24) was passed to remedy this defect. The words are 'whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found and *in like case* falling under *like Laws* and requirng *like Remedy* is found none, the clerks of the Chancery shall agree in making the Writ (or the plaintiffs may adjourn it) until the next Parliament, and let the cases be written in which they cannot agree and let them refer themselves until the next Parliament by consent of men learned in the law, a writ shall be made, lest it might happen that the court should long time fail to minister justice unto complainant.'

This statute gave to the clerks of Chancery authority to frame new writs in *consimili casu*. It should be noted that the clerks could not issue an entirely new writ. The principle according to which the new writs could be issued was by way of analogy of the previous actions. This accounts for the great number of writs of trespass on the case in the Register of writs. The suitor in that way was satisfied because he got what he wanted. If the judges had shown liberty in extending writs on a large scale, there would not have arisen the necessity of having a separate Court of Chancery. Gilbert² says: "The Register of Writs contains the forms of writs

¹Commentaries, Vol. III.
p. 273.

²History of Common Pleas,
1761 A.D., p. 105.

When we examine this register we find that the writs relating to land are of two kinds, *droitural* and *possessory*, while writs relating to person are *ex contractual* and *ex delictual*. Under *ex contractu* we find mention of debt which was to restore the same *in numero* ; and the other the same in *specie* or damages, and also actions of account, covenant and annuity. Actions *ex contractu* were either for trespass founded on force, which were trespass *vi et armis*, or upon fraud, which were actions upon the case.” Reeves¹ says : In the time of Glanville and Bracton writs were *formatta* that is every particular variation was formed by the express authority of Parliament and the Clerks in Chancery could not alter an *iota* of that which had been sanctioned by the legislature. If the increase of writs was so rapid under the great difficulty of applying to Parliament in every new case, it is not to be wondered at, that after the Statute of Westminster II had allowed the clerks to make writs in *consimili casu*, the number and variety of them should multiply to the degree they did ; and that where there were seven or eight different precedents of one kind in Bracton, there were ten or more in the register. In Henry VI’s reign ten inns of Chancery were established for this particular study which was considered as containing the first principle of law.’

Every case must begin with a new writ. By means of an original writ a suit can be instituted in the King’s court ; this idea is very closely connected with the schemes of action and the peculiar features of English Law. We cannot positively say whence this institution has been derived. In Henry II’s reign we find the institution Glanville mentions specimens of writs. Coke² states that some of these writs existed before the time of the Conquest. Gilbert³ says the idea of the writ was imported from Normandy and he

¹*Hist. of Eng. Law*, Vol. III
p. 430.

³*Hist. of Common Pleas*,
p. 215.

²In his preface to 10 Report,
p. XXV.

emphasises the fact that there should be no proceedings in the King's Court in Common Pleas without the King's writ, and a writ always issued to warrant the Court's proceedings.

Action on
the Case.

This was the outcome of the Statute of Westminster II (13 Ed. I c. 24). The first writ of action on the case is found in the Year Books of Edward II. The formal part was worded similarly to the writ of trespass, but the words *viet armis* were omitted. The plaintiff was able to recover damages in cases arising from *quasi* contracts or *quasi* torts. In the cases arising from contracts were included actions where contractual relation existed between the parties but where the real ground of action was breach of duty collateral to the agreement entered into between them. In cases arising from *quasi* torts, actions respecting wrongs were included¹.

In every case in which a person had suffered a temporal loss or damage by the wrong of another, the action on the case was allowed to recover damages. *Miller v. Taylor* (1767, 4 Burrows, p. 2345) decided that the remedy by action upon the case is suited to every wrong and grievance that the subject may suffer from a *special* invasion of his right ; for this sort of action varies, says Lord Coke (8 Co. 482), according to the variety of the case. Ashhurst² J. says: "Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance ; but where the case is only new in the *instance* and the only question is upon the application of a principle recognised in the law to such a new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago." The difference between trespass and action on the case can be shown thus : in trespass the plaintiff had to show that he had suffered from actual or implied violence by

¹Fitzherbert's *Natura Brevium*, "Trespass sur le Case," Vol. I, pp. 92—95.

²*Pasley v. Freeman* (1869) 3 Term Reports, p. 63.

a tangible matter, and the plaintiff had immediate interest ; while in action on the case there was no actual or implied violence used or the matter was intangible and the injury was not the direct but indirect consequence and the interest was in reversion. The gist of the action was a tort and not a trespass. It is called action on the case because the whole cause or matter had to be fully described in the writ¹.

The Common Law Commissioners, 1851, write : Action of
 ‘Suppose a person throws a log of wood on the highway Assumpsit.
 and by the act of throwing another person is injured,
 the remedy in such a case is trespass. But if the log
 reaches the ground and remains there and a person
 falls over it and is injured, the remedy is case, as the
 injury is not immediately consequent on the act².’

The chief instances in which action on the case was allowed are :—(1) Action on the case for words. (2) Action on the case lies, when there is an undertaking and such action is based on a contract express or implied by law and the injured party gets damages. In Slade’s case³ it is written that the said H. Morley did take upon him in manner and form in the declaration within specified, then the said jurors say upon their oath aforesaid that the aforesaid H. Morley did take upon him in manner and form as aforesaid John Slade within against him complaineth ; and then they do assess damages of the said John Slade by occasion of not performance of his promise, etc. (3) When there was deceit⁴. (4) For neglect or malfeasance. (5) For malicious prosecution.

¹Comyn’s *Digest* (1822) III,” also pp. 508—510, “Action upon the Case,” Vol. 605—608.

I, pp. 278—283, Bacon’s *Abridgement* (1832) Vol. I, pp. 86—100 ; Reeve’s *History of English Law*, Vol. II, ch. 16, pp. 393—400. “Action of Trespass and action on the case in the reign of Edward

²*First Report* p. 31.

³*Coke’s Reports*, 92 Vol. II pp. 503—504.

⁴Bacon’s *Abridgement*. “Action on the case E. for fraud and deceit in contracts on warranty.” pp. 95—100.

This action of trespass on the case was allowed because there was a wrongful act. At first this action was allowed for a malfeasance and subsequently it was allowed for a misfeasance, that is doing a lawful act in an unlawful manner. Lastly, this action of trespass on the case was allowed for non-feasance. It then alleged that there was an assumpsit. Both trespass and trespass on the case were torts. The following is the case law by which trespass on the case was used in cases on *mis-feasance*.

In Y.B. Edw. III¹ the plaintiff alleged that the defendant undertook to carry the plaintiff's horse across the Humber safely, but owing to overloading the boat, the horse was drowned. It was objected that the action should have been Covenant for breach of the agreement or trespass. The answer was that the defendant had committed a tortious act in overloading the boat. It was stated that there was an undertaking to carry the horse safely. The defendant had not directly used any force. Reeves writes about this case "The notion of a trespass or a malfeasance was the principle upon which the application of this new remedy was explained and justified²."

In Y.B. 42 Edw. III 13 trespass was brought against an inn-keeper and his servant; upon which the plaintiff counted that whereas it was a custom of the realm that all common inns, inn-keepers and their attendants should take care of goods which were left in the inn, and the plaintiff left certain things in his chamber there; and while he was out, somebody took away his goods through neglect of the defendant and his servants per tort, and the plaintiff suffered damage, the writ was granted according to his case.

In Y.B. 43 Ed. III 33 (38). Defendant treated a horse so negligently that it died. Here it was a tortious act. The plaintiff could not sue in trespass because there was no violence.

¹22 *Assisarium*, Liber part V, 94 (41).

²2 *Hist. of Eng. Law*, p. 395.

Y.B. 44 Ed. III 20. Force was used in carrying away two bushels of corn from the plaintiff's farm. Held that as the words *vi et armis* were not inserted in writ, the action must fail.

Y. B. 46 Ed. III pl. 19. An action of trespass was brought against a farrier, employed to shoe the plaintiff's horse, *quare clavum fixit*. Objection was taken that it was in trespass and yet *vi et armis* was not inserted in the writ. The answer was that the plaintiff had brought his writ according to his case, and in spite of the objection that in the writ the words *vi et armis* should have been inserted, it was held to be a good writ. It was not until after 46 Edw. III, that *contra pacem* was dropped from declaration in action on the case.

In Y.B. 48 Ed. III 15 the writ stated that the plaintiff's right hand had been hurt and the defendant undertook to cure it ; but by negligence of the defendant and want of care his hand became so much worse as to become a *mayhem*, and the writ was neither *vi et armis* nor *contra pacem*. This was held good and treated as an action of trespass and yet because it did not allege force, arms and *contra pacem*, it was considered so far, as differing from trespass properly so-called.

There are instances of action *sur le case* in the Year Books of Edward I and Edward II, but the evolution of the 'case' for breach of a promise or undertaking (*assumpsit*) occurred between the twenty-second and forty-second year of Edward III. The procedure was obscure and unsettled in this reign in trespass on the case ; the distinction became clear in the reign of Henry IV.

The action upon the case was applied to cases of non-performance of promises because it was a very convenient remedy. Reeves¹ says : 'It was thought somewhat harsh to give the name of trespass to a thing which was never done ; it took some time and needed the concurrent force of some strong motives to induce the courts to admit these new writs.'

¹*Hist. of Eng. Law*, Vol. II p. 508.

Misfeasance
and Non-Per-
formance.

The gap between misfeasance and non-performance is ethically narrow, but in legal procedure it is very wide. This gap was filled up when assumpsit was evolved from action on the case. The simple contracts were then enforced in superior courts of common law when action of Assumpsit was established. In 1400 Y.B. 2 Henry IV 3 (9). Assumpsit was brought against a carpenter for not building a house. The defendant urged that the matter was only in Covenant and the court agreed. Rickill J. said : " You have counted on a Covenant and show none, take nothing by your writ." But it was suggested by the judge that if the writ had mentioned that " the thing had been commenced and then by negligence not done, it would have been otherwise." Y.B. 11 Hen. IV 33 (60). The plaintiff brought an action against a carpenter, for he had undertaken to build within a certain time and had not done it. It was objected that the writ sounded in Covenant. This was supported by Brian who conceded that if the plaintiff had begun to build the house and then stopped or built it negligently, the action would be quite justifiable. But as the plaintiff had not begun to build the house, the writ was dismissed. In Brooke's *Abridgement* (" Action *Sur le Case*," 40) it is stated that in these cases there was no consideration alleged ; that it was *nudum pactum* and therefore the action could not lie. The cause appears by report to have been dismissed both times upon the same defects, *viz.*, the want of a written Covenant and the prevailing opinion which confined, says Reeves ; " these cases to instances of malfeasance and negligence where the defendant had really *done* something."

The action upon the case expanded itself because the Common Law had not provided any remedy. It was very widely applied. Y.B. 3 Hen. VI 36 (33). Babington J. said : " If a man Covenant with me to cover my hall or house within a certain time and does not, and owing to his not covering the hall, the former is destroyed, there should be a writ of trespass on the case." Y.B.

9 Hen. VI 60.—Action upon case was allowed against an escheator for a false return of an office. Y.B. 19 Hen. VI 49 (5). The defendant administered drugs so negligently that the horse died. There was no undertaking to cure the horse, the plaintiff did not succeed because there was no *duty* on the part of the defendant to cure the horse. Y.B. 14 Hen. VI 18 (58).—A man brought an action on the case alleging a bargain for the purchase of land from the defendant for a certain sum and a Covenant by the defendant to procure a release from strangers, which release he had not procured. This was a case of non-feasance. Held that the writ was good. Y.B. 11 Hen. VI 18 pl. 10.—A person was retained to purchase a manor for the plaintiff and he did not do it. Held that the plaintiff could have no remedy against the defendant, unless the agreement was by deed and the action could be on Covenant; but if the defendant assisted another in buying the manor, this was a case of *deceit* against the plaintiff, and the action on the case was allowed. Y.B. 20 Hen. VI 34 pl. 4.—This was an action of deceit brought against John Doight. The plaintiff counted that he bargained with the said John for the purchase from him of so much land for £100 paid to him and that the said John had enfeoffed one A of the same land and had so deceived him, and damage resulted to the plaintiff from non-feasance. Action for non-feasance was allowed because the plaintiff had actually paid £100 and was bound to get land from the defendant. There was a moral right. The chancellor gave relief because there was a moral duty.

Y.B. 21 Hen. VI 55. If a carpenter make a bargain or Covenant with me to make a house sufficient and good containing such a measurement and by a certain day if he makes me no house, I shall not have a writ of trespass on the case against him, but an action of Covenant if the bargain was in writing; but if he makes the contrary to the Covenant, even though there was no writing I shall have an action on the case. Newton¹ J. stated

¹Y.B. 22 Hen. VI, p. 44.

that if land was sold, the vendor might have debt for the money and the vendee might have an action upon the case if he was not enfeoffed of the land. Y.B. 28 Hen. VI. 7. Action on the case was allowed against the owner of a dog, which had bitten the plaintiff's sheep the owner defendant knowing that the dog was given to biting animals. Y.B. 39 Hen. VI. 18. Action on the case was allowed against an inn-keeper for not providing victuals to the plaintiff.

Courts
Favour Ac-
tion for non-
feasance.

The courts show a great inclination to overrule the objections which were urged when the action on the case was brought for non-feasance. In Y.B. 3 Hen. VI. 36 (33) the distinction that previously existed between non-performance and negligent performance is denied, *e. g.* A mill owner fails to build a mill during the time appointed according to the undertaking. In Henry IV's reign if the builder had done the work unskilfully, action on the case was thought proper, but if he did not do the work at all, action was not allowed, because it sounded in Covenant and owing to the absence of writing could not be enforced. Babington J. said: "If there is a Covenant to cover my house by a certain day but the house is not covered, and if by rain the house is damaged the owner of the house, can sue for damages by action on the case." Reeves¹ says: "We have every reason to suppose that the *promise* meant in the reports of this period was an *actual undertaking* which could be proved and not an implied promise as was in after times pronounced to arise in point of law in cases where a duty was previously due." It was also generally agreed that a declaration for such a promise should be mentioned in the pleadings, as it would be otherwise a *nudum pactum* to which the law would never give effect.

If the undertaking was under seal, an action was allowed if nothing was done to carry out the undertaking; but if no seal was used, the action was allowed only if the defendant had entered upon the undertaking, but

¹*Hist. of Eng. Law*, Vol. II., pp. 607-608.

owing to negligence did not fulfil the promise. No action would lie if nothing was done at all. It was then suggested that omission to take due care after assumpsit was in its nature an action in contract. When omission during performance had once been a ground of remedy, gradually the same effect was given to the omission at any time after assumpsit, if damage was the result. The word assumpsit or undertaking implied : (1) undertaking and (2) promise. The first idea suggests the idea of tort. The second idea suggests the idea of contract. In the reign of Henry VII the judges held that an action on the case would lie both for non-feasance and malfeasance. In Y.B. 2 Hen. VII p. 11 (9) the plaintiff sued for damages for the loss of his sheep. The allegation was that the defendant was negligent in keeping them and in consequence they were drowned. Townsend J. said : " When the party undertakes to guard the sheep and afterwards allows them to be drowned by his default, seeing that he has undertaken to keep them safely and afterwards does not take care of them, the action lies." Y.B. 3 Hen. VII. 14. The defendant had undertaken to procure a lease for a person for a certain sum of money, but instead of doing so got the lease for himself. Brian J. tried to meet the scruple of the defendant on the old ground that he had done nothing, by asking whether if he promised upon Consideration to make feoffment to one person and afterwards made it to another, that would not constitute misfeasance. In Y.B. 21 Hen. VII 30 it was held by the whole court, that action on the case would lie both for non-feasance and misfeasance. Y.B. 21 Hen. VII. p. 41 Fineux C. J. said : " If one Covenant to build me a house by such a day and does not do it, I will have action on the case for this non-feasance as well as for building it imperfectly." Reeves¹ says : " Thus was the action upon the case by degrees adapted almost to all purposes : sometimes as a remedy, where the Common Law had furnished none and sometimes in the place of the old-established actions which were found less adequate than

¹*Hist. of Eng. Law* Vol. II, p. 608.

this to obtain the ends of justice. It was the usual mode of redress in most cases of malfeasance or negligence whether of private persons or of those in office, and the party thereby received a recompense in damages for the wrong sustained. These afforded a ground-work to extend it by a reasonable analogy to all the consequences which have since been built upon it : so that the specific writs before in use, the writ of deceit, conspiracy, detinue began gradually to go out of practice and the actions upon the case of a liberal view were framed in analogy to those remedies. It only remained to substitute action of assumpsit for the action of debt."

It is not clear whether in the fifteenth century the Chancellor recognised that a bargain and sale transferred the use. Ames¹ agrees with the remarks of Justice Holmes that 'the doctrine of uses is as little a creation of the subpoena or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilisation which the Common Law was too archaic to deal with.' In Y.B. 21 Hen. VII Hil. pl. 30, there is a difference of opinion and in Y.B. 20 Hen. VII Mich. pl. 20 the point is treated as open. In *Wheler v. Huchynden* (Chancery Calendar 11.11) the facts were these. The plaintiff relied on a promise made by the defendant to convey land to him and in consequence expended money in consulting a lawyer ; the defendant broke his promise by not conveying the land to the plaintiff. This case was decided between 1377 and 1390. The bill sounds in tort rather than in contract and inasmuch as even cestuique use could not compel a conveyance by their feoffees to use at this time, its object was not specific performance but reimbursement for the expenses incurred. In *Appelgarth v. Sergeantson*, 1438 (1 Chancery Calendar XLI) a bill for restitution in *integrum* was brought against a defendant who had obtained the plaintiff's money by promising to marry her and had then married another in deceit². Action on the case

¹21 *Harv. L. R.* "Origin of Uses and Trusts." *Croke's Reports Easter Term*, 29 Eliz, Roll 90, p. 79.

²*King v. Robinson* (1505) 1

was allowed under similar circumstances. Y.B. 8 Ed. IV 4 pl. 11.—The defendant induced the plaintiff to become the procurator of his benefice and promised to save him harmless for the occupancy, secretly resigned his benefice and the plaintiff obtained relief by subpoena.

These cases show how keen had been the competition between the courts of Chancery and Common Law, and there must be remedy given at Common Law for such cases ; otherwise suitors would resort to Chancery.

Competition
between
courts of
Common
Law and
Chancery.

In sale of chattels if a man contracted to buy specific chattels for a fixed price and paid the money, he was allowed to bring action of detinue for the chattels, the vendor was allowed to bring action of debt if the price was not paid to him. But if the transaction was sale of land, if the purchaser had paid the price and land was not conveyed, he was not allowed to bring action of detinue for the land. This was obviously unfair. In such a case action of deceit was allowed. In Y.B. 2 Hen. VII. (Hil. pl. 15) and Y.B. 3 Hen. VII. (Mich. pl. 20) it is not stated that the price was paid when the contract was made. In Y.B. 21 Hen. VII (Mich. pl. 66) the price is mentioned. The distinction between misfeasance and non-feasance in the case of promises given for money was altogether too shadowy to be maintained. It was formally abandoned in 1504 as appears from Y.B. 20 Hen. VII (8 pl. 18). Frowyk C. J. said : “ If I sell you ten acres of land, a parcel of my manor, and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money and in that case you have no other remedy against me ; and so if I sell you my land, and Covenant to enfeof you and do not do so, you shall have a good action on the case and this is adjudged. If I Covenant with a carpenter to build a house and pay him £20 for the house to be built by a certain day, I shall have a good action on my case, because of payment of money and still it sounds only in Covenant and if money is not paid in this case there is no remedy, but if he builds it negligently, action on the case lies. This is true of non-feasance and

money paid when action on case lies." Holdsworth¹ states : ' If we look, at these reasons for thus deciding from the point of view of older law, we must allow that they are rather specious than sound'. He concludes : " It was a very necessary decision, if the competition of Chancery was to be successfully met". Newton C.J. and Prisot had been ready to decide that a wholly executory contract to sell land, was actionable. In the reign of Hen. VI writs were allowed on the following reasoning :—If a man agreed to sell a chattel for a fixed price, the purchaser could sue in detinue for the chattel. The grant of the price was regarded as *quid pro quo* in return for the grant of a right to possess the chattel. It was taken for granted that the same reasoning should be applied in the case of land. The purchaser was liable in debt for the price, the vendor had an equitable right to the land and as he could not sue in Covenant or detinue, he must be allowed to sue by action of deceit on the case. This is false reasoning, because in the case of agreement to sell land action of debt could not be allowed because there was no *quid pro quo*. In the case of an agreement to sell a chattel, detinue was allowed. So the proper result of this reasoning would be to leave the purchaser without any remedy if the seller failed to convey the land and the action of debt could not be brought to recover the money. Ames says : " This reasoning was a departure from the strict principle." Holdsworth says: "It is not merely an idiosyncrasy of the judges who adopted such a reasoning at all. It was a means of arriving at a decision which was expedient, if the Common Law Courts were to retain a jurisdiction over matters which the Chancellors might otherwise have drawn to themselves. It is a mistake to seek for logical and consistent reasoning in the decisions of the Courts of the time " ; because the main point was to hit upon a liberal principle so that it might be possible to test if agreements could or could not be enforced. The Chancellor Stillington says it is true that a subpoena will issue against a carpen-

¹*Hist. of Eng. Law*, Vol. III., p 339.

ter if he fails to carry out his promise to build. But neither his remark nor statement in *Diversity of Courts* Chancery, can show that equity ever enforced gratuitous parol promise. Upon *nudum pactum* there ought to be no more help in Chancery than there is at the Common Law. Ames¹ says : " While it is confidently submitted that no instance can be found prior to the time of Lord Eldon in which equity gave relief upon a gratuitous parol promise, it is certainly true that Chancery did in some cases furnish a remedy upon parol Covenants." Ames thus sums up : " The Ecclesiastical Courts had no jurisdiction over agreements relating to temporal matters, Chancery gave relief upon parol agreement, only upon ground of compelling reparation for what was regarded as a tort to the plaintiff, or upon the principle of preventing the unjust enrichment of the defendant and the Common Law prior to assumpsit recognised only those parol contracts which were based upon a *quid pro quo*."

The jurisdiction of Equity was rarely required when a breach of promise took place after action of assumpsit was developed, except in cases where specific performance of the contract was claimed. Holmes² states that the old contracts lingered along into the reign of Edward III until the Common Law had attained a tolerably definite theory which excluded them on established grounds and the Chancery had become a separate court. The Clerical Chancellors seem for a time to have asserted successfully in a different tribunal the power of which they had been deprived as ecclesiastics to enforce contracts for which the King's courts gave no remedy. But in so doing they were not making reforms or introducing new doctrines. Salmond³ writes : " There is little or no evidence, that Consideration was applied by equity to contracts." Holdsworth⁴ says : " It is clear that the judges wished

¹ 8 *Harv. L. R.*, p. 255.

² 3 *Law Q. R.*, p. 173.

³ 1 *Law. Q. R.*, Early English Equity", p. 174.

⁴ *Hist. of Eng. Law*. Vol. III, p. 341.

to find some principle by means of which they could enforce some purely executory contracts." They hit upon the idea that the test should be whether or not the plaintiff had come under some legal liability to the defendant. But this was really an impossible test because it involved a circular argument. Those who used this argument had to assume that there was a legal liability to be sued in debt. This was not true and they argued from this assumption that liability to sue resulted. Y.B. 2 Hen. VII. Hil. pl. 15, Y.B. 3 Hen. VII Mich. pl. 20 are useful to show how the judges of the Courts of Common Law were in dread of the usurpation of their jurisdiction by the Chancellor's Court.

In the reign of Hen. VIII action upon the case had become quite known and one of the judges (Y.B. 14 Hen. VIII c. 31) went so far as to assert that where no other remedy was provided by law, an action on the case was the proper remedy. The question was if it was an action on tort or on contract. Would the action of assumpsit lie against executor? The action of trespass on the case which has assumed the *name of assumpsit* is now defined to be an action by which a party claims damages for breach of simple contract, *i.e.*, a promise not under a seal, which promise may be express or implied¹; but it must have a good Consideration². This action has been extended, 'Conscience encroaching on the Common Law, to every case where an obligation arises from natural reason and the just construction of law that is *quasi ex contractu*³. In Y.B. 2 Hen. VIII, Mich. 11 pl. 3 it was decided that an action of assumpsit will lie against executors because (1) there was no remedy at law except by this action; and (2) the plaintiff had delivered the goods relying on the promise of the deceased testator. As the deceased had left assets, 'his soul should not be put in jeopardy by the prejudice the plaintiff suffers.' Fineux C. J. added that the rule *actio personalis moritur cum persona* did not apply to the case, for it was not a

¹Stephen on *Pleadings* 18;
Chitty on *Pleadings*, pp. 110,
111.

²Comyn, *Digest*, "Action of
Assumpsit," A 1, 174.

³*Cooper*, pp. 290, 294.

case of personal injury. In Y.B. 27 Hen. VIII (23 pl. 21) Fitzherbert was of opinion that by the death of the testator all debts due by simple contract died also, because the testator might have waged his law and the executors not having that privilege, they should not be liable to the action. In Pinchon's¹ case this dictum was overruled. As to the liability of personal representatives on contracts of the deceased testator or intestate, see *1 Saunderson's Reports*, by J. Williams, 241 c, where it is stated that "It is now settled by these cases that the privity of contract of the testator is not determined by his death, but the executor shall be charged with all his contracts so long as he has assets." The old rule that an action of debt on simple contract would not lie against executors where the testator could have waged his law seems to have been an innovation. Fleta² gives a form of writ for or against executors. Fitzherbert³ says: "If a man be indebted or enter into religion, his executors shall be sued for the debt and not the abbot who accepted him into religion." Pinchon's⁴ case decided that action on the case upon assumpsit for the payment of a debt would lie against executors. No action of debt would lie against executor where if action had been brought against the testator, he might have waged his law. It was resolved by the judges: "Action on the case did lie against executors and that not only without impugning any rule or reason of law or any book on the point, but well warranted and confirmed by divers authorities in law, judgments and resolutions late and ancient." In Y.B. 27 Hen. VIII., 24 (3), the difference between action of debt and action of assumpsit is pointed out. A person went to the wife of the keeper of a gaol and promised to pay a certain sum of money to her husband if one T who was in the gaol were set free, if T did not pay the money. The keeper of the goal relied on this promise made to his wife and released T from the gaol. T did not pay, and in consequence the gaoler sued

¹(1612) 9 Co. Rep. 86 b.

²*Natura Brevium*, 119 M.

³Lib. 2, ch. 62, s. 9 p. 154.

and 121.

⁴*Supra*.

for the breach of promise in action of assumpsit. The defendant contended that the proper action should be debt and not assumpsit because the wife cannot be a party to such an action without any authority to act from her husband. The court decided that assumpsit to the wife was quite sufficient to charge the husband and that the action was properly framed. Brook B. said: "I understand that one will not have the writ of debt, for the defendant had not given *quid pro quo*, but the action is solely founded on the assumpsit which merely sounds in Covenant; and if it had been by specialty, the plaintiff would have had the action of Covenant, but seeing that he had no specialty, he had no remedy except on action on the case". Spelman and Port justices were of the opinion that either action was good at the plaintiff's option. Fitzjames C. J. held that action on the case was the proper remedy, because the plaintiff could not say that he entered into contract with the defendant nor that any *quid pro quo* was given.

Gradually the practice grew up to allow actions for the recovery of simple contract debts by stating the debt to arise upon a promise to pay and when the plaintiff succeeded in proving his debt, the court construed it that there was an implied undertaking to pay that debt.

An action¹ upon the case was brought on an assumpsit to pay £10 for a horse and cow sold. The defendant pleaded that the plaintiff in a previous action of debt had waged his law for the same sum. Held a good plea for he was barred of the same sum².

An action upon the case was brought in London by A B. stating that whereas he was possessed of certain wine and other stuff in such a ship belonging to the defendant, defendant had promised £10 to satisfy the plaintiff in £100 if the ship and goods did not come safe. Held that

¹ Some New Cases of the years of Henry VIII, Edward VI, and Queen Mary, translated into English by John March in 1651. "Instances of action

upon the case," pp 3—9.

² 33 Hen. VIII New Cases, p. 5; Brooke Action upon the Case, No. 105.

though the bargain was made beyond the sea and not in London, yet in an action upon the case upon an assumpsit and the like which is not local, the place is not material (no more than in debt) for he alleged that the said goods in the parish of S. Dunston in the East London, before they were sent to land were carried away by persons unknown and the action lay well in London though the goods perished on the high seas¹. In an action upon the case where the plaintiff delivers goods to the defendant and the defendant for ten shillings promises to keep them safe and does not to the damage held by Fitzherbert and Shelley justices *non habuit ex deliber ac* is a good plea.

The action of assumpsit was used to supply the place of detinue, *e.g.* defendant had promised for 10 shillings to keep the goods of the plaintiff safe. But he did not keep the goods safe and action of assumpsit was held good; formerly action of detinue would have been proper. The action of assumpsit was allowed, where the defendant found goods of the plaintiff and delivered them to a stranger, for "whereas the plaintiff was possessed as of his proper goods and the defendant found them and converted them to his proper use"². Again there is an action upon the case where the goods of the plaintiff came to the hands of the defendant and he wasted them³. Reeves⁴ states that in this manner the action upon the case in one shape or other spread itself over many of the old writs and it grew every day more common. The style of pleading in actions upon the case was very much as before. The defendant denied usually that part of the declaration which led to the charge, sometimes the plea stopped there; and sometimes there would be added denial of the charge itself.

We have seen that the plaintiff was awarded damages in an action on the case for none-feasance because he

¹34 Hen. VIII *New Cases*, p. 7; Brooke *Action upon the Case*, 107.

²33 Hen. VIII, Brooke *Action upon the Case*, 109; *New Cases*, p. 6.

³Hen. VIII, Brooke, *Action upon the Case*, 103 to the end; *New Cases*, p. 6.

⁴*History of English Law*.
VOL. III. p. 407

had paid money to the defendant relying on a promise. If the plaintiff had suffered a detriment by relying on the promise of the defendant, was that not a sufficient reason to base a ground of action? In Y.B. 12 Hen. VIII (Mich. pl. 3) and Y.B. 27 Hen. VIII (11 pl. 3) it was decided "If one sold goods to a third person on the faith of the defendant's promise that the price shall be paid, he might have an action on the case upon the promise." Ames¹ says: "This decision introduced the whole law of parol guaranty; cases in which the plaintiff gave his time or labour were as much within the principle of the new action as those in which he parted with property, and this fact was speedily recognised." In Saint Germain's Book *Doctor and Student*² the student of law thus defines the liability of a promisor, 'If he to whom the promise is made, have a charge by reason of the promise, he shall have an action for that thing that was promised, though he that made the promise have no wordly profit by it.' From that day to this a detriment has always been deemed a valid Consideration for a promise, if incurred at the promisor's request³. Pecke v. Redman, 1555, By. 113 (a) was a case of assumpsit upon mutual promises. The case was that one Pecke and one Redman bargained together in the second year of Edward VI that R should deliver or cause to be delivered to the plaintiff, who was Pecke, twenty quarters of barley every year during their two lives, between certain days, etc.; and showed in the count that the defendant broke his promise. Held that action would lie. In Webb's case (1578 (19 Eliz.) 4 Leon. 110), action upon the case, the plaintiff declared that whereas Cobham was indebted to J. S. and J. S. to the defendant; the said defendant in Consideration that the plaintiff should procure the said J. S. to make a letter of attorney to the

¹ 25 *Law Magazine and Review*, p. 146.

² Dialogue II ch. 24, p. 214. This book was first published by Rastall in Latin in 1523 under the little "*Dialogue de*

fundementis legum et de conscientia." It was reprinted in English between 1530 and 1531.

³ Y. B. 27 Hen. VIII, p. 24, pl. 3.

defendant to the said Cobham, promised to pay and give to the plaintiff a sum of money. It was objected that there was no Consideration to induce the assumpsit, for the defendant by this letter of attorney got nothing but his labour and travel. But the exception was not allowed. For in this case not so much the profit which rebounds to the defendant as the labour of the plaintiff in procuring the letter of attorney is to be respected. In *Richards v. Bartlett* (1584, 1 Leon. 19) the action was of assumpsit. The opinion of the whole court was clearly with the plaintiff because there was no Consideration set forth by reason whereof the plaintiff would discharge the defendant of this matter, for no benefit but damage came to the plaintiff by the new agreement and the defendant was not put to any labour or charge by it, therefore there was no agreement to bind the plaintiff. In *Baxter v. Read* (3 Leon. 272a, note), it was adjudged that when Baxter had retained Read to be miller to his aunt, at 10 shillings per week, debt did not lie upon this, but in an action on the case; for in debt it is requisite that the benefit come to the party who promises and so for the want of a *quid pro quo* debt does not lie, but it was held by the court, this would support an action on the case, for although it was not beneficial to Baxter, it was chargeable to Read¹. In *Foster v. Scarlet*² it was held that a promise to convey lands in Consideration of being released from debts is good. In *Greenleaf v. Jo. Barker* 1890³ *A* was indebted to *B* in £5 on a bond payable on 1st November. *B* in Consideration that *A* would pay the bond on 3rd November promised to deliver to *A* the bond of *G* for 20 shillings with a letter of attorney to sue for it. Will assumpsit lie on this Consideration? In *Knight v. Rushworth* 1596⁴ a promise to pay the bond of a third person in Consideration of the obligee going before a magistrate

¹ Cowp. 294.

case 8, p. 193.

² 1 *Coke's Reports* Elizabeth, case 26, p. 70.⁴ 1 *Coke* Hil. term, 38 Eliz. p. 469.³ *Coke's Reports*, Elizabeth,

and deposing upon oath that it was rightly read over to the obligor, is sufficient to maintain an assumpsit. In William Barnes's case 1611¹ it was stated that if an executrix in Consideration of forbearance promise to pay the debt of a testator on a certain day or to assign her interest in a term of years of which she is possessed as executrix as a security for the payment of the debt, she shall be charged generally in an action of assumpsit brought on the promise and the plaintiff need not aver in his declaration that she had assets at the time of the promise. These cases show that the remarks of Mr. Justice Holmes² that "the law oscillated for a time in the direction of reward as the true essence of Consideration," cannot be correct and in *Smith v. Smith* (1583, 3 Leon. 88) and *Pickes v. Guide* (1608 Yelv. 128) the point of benefit was questioned as arguable. Langdell³ says: "It is frequently laid down as a rule that a Consideration must consist of some benefit to the promisor, or some detriment to the promisee, as if either one of these would do; and in applying this rule, it is a common practice to inquire first if there is a benefit to the promisor as if an affirmative answer to that question would render all further inquiry superfluous and as if that were the quality which every Consideration ought to possess to place it entirely above suspicion." In *Scotson v. Pegg* (6 H. and N. 295) Martin B. said expressly that "Any act done whereby the contracting party receives a benefit is a good Consideration for a promise by him. In truth benefit to the promisor is irrelevant to the question whether a given thing can be made the Consideration of a promise, although it may be very material to the question whether it has been made so in fact. There may be a clear benefit to the promisor and yet no Consideration, *i.e.*, where the benefit does not come from the promisee. On the other hand, detriment to the promisee is a universal test of the sufficiency of Consideration." Salmond⁴ says: "Consideration is defined as

¹9 *Coke Reports*, 93 b.

Contracts, s. 64, p. 61.

²*Common Law*, p. 287.

⁴*Essays*, p. 194.

³*Summary of the Law of*

consisting either in some benefit obtained by the promisor or some detriment incurred by the promisee. The above definition is correct for practical purposes but is defective from the point of view of legal theory because it is a definition of the genus by an enumeration of the species. It does not state the relation between detriment to the promisee and benefit to the promisor nor is any reason given for classifying them together". Leake¹ defines Consideration as 'some matter accepted or agreed upon as a return or equivalent for the promise made'. Pollock², defines Consideration as 'an act or forbearance of the one party or the promise thereof, is the price for which the promise of the other is bought.' Salmond criticises the above definitions because to regard Consideration simply as a recompense or equivalent is to eliminate altogether that important species of Consideration 'which consists not in any benefit to the promisor but in a detriment to the promisee'.

It is quite possible to regard Consideration as consisting in every case in a loss sustained by the promisee. For it must be noted that in order that a benefit to the promisor should constitute a good Consideration, it is quite necessary that such benefit should move from the promisee. Hence the rule as to Consideration may be stated thus: "A promise is not binding unless the promisee has suffered a detriment by acting in reliance on that promise, and in manner intended by the promisor." Harriman, on *Contracts*, thus criticises the definition of Consideration as a benefit to the promisor or detriment to the promisee: "Is there any connection between the two? The action of debt and action of assumpsit are the two common sources of the doctrine of Consideration. The *quid pro quo* in debt was a benefit to the debtor while the origin of the defendant's liability in assumpsit was that the plaintiff had been induced to act on reliance upon his promise. Detriment to the

¹ *Contracts*, 6th Ed., p. 5.

² *Contracts*, 8th Ed., p. 175.

promisee is a Consideration upon which the modern theory of simple contracts is based."

Common
Indebitatus
Counts.

These counts are variously termed, money counts, indebitatus counts, common counts. The term is used to signify those cases in which debt is incurred for goods sold and delivered, goods bargained for and sold, work done, etc., while the expression 'money counts' is specially applied to those cases in which money is lent, paid and received. The most appropriate name is *indebitatus* counts. The plea usually urged is *nunquam indebitatus*; while the counts which state the cause of action more fully are called special counts; *quantum meruit* and *quantum valebat* counts are used where the price for work done or goods sold is not determined beforehand¹. These counts are now obsolete and only the general application of *indebitatus* counts is in use. Before the Common Law Procedure Act, 1852, the plaintiff was required to specify the form of action in the writ, but this is no longer so². In the pleadings before 1873 the plaintiff in order to maintain an action against the defendant for services rendered or work done had to set out particulars of his claim. These particulars were technically called *indebitatus* counts. They resembled action of assumpsit of debt, *e.g.*, liquidated sum of money due, goods supplied. At times the counts were allowed in matters springing from special contracts. The party would base his claim upon: (a) a broken promise, and (b) a new promise had arisen by acceptance of what was done. This was given the name of *indebitatus assumpsit*. The meaning was that the party having incurred a debt, must have promised to pay. This count was used in express contracts where one party had performed his promise wholly or in part and the other party had broken his promise completely.

Legal
History.

Slade's case (1603)³ decided that action on the case can lie on a simple contract as an action of debt and

¹ Chitty, *Pleadings*, 7th Ed., 351.

³ 4 Rep. p., 92 (a), pp. 499—512.

² Bullen and Leake, *Pleadings*, pp. 35—63.

damages can be recovered for the whole debt and special loss. This case is commonly regarded as the source of assumpsit¹ but Ames says *indebitatus assumpsit* upon an express promise is at least sixty years older than Slade's case. In *Brooke's Abridgement*² there are cases to that effect. Brooke in a note writes: "Where one is indebted to me and he promises to pay before Michaelmas, I have an action of debt on the contract or an action on the case on the promise³." Manwood⁴ C.B. said; "There are three manners of Consideration upon which an assumpsit may be grounded: (1) A debt precedent; (2) Where he to whom such a promise is made is damnified by doing anything or spends his labour at the instance of the promisor, although no benefit cometh to the promisor. As I agree with a surgeon to cure a poor man (who is a stranger unto me) of a sore who doth it accordingly, he shall have an action. (3) If there is a present Consideration. In 1587⁵ an instance is given where *A* bargained with *B* for twenty loads of wood and *B* promised to deliver them at *D*, if he failed an action on the case would lie. But Periam J. said that upon a simple contract for wood upon an implicative promise, an action upon the case doth not lie.' Rodes J. said: "If by failure of performance, the plaintiff be damnified to such a sum this action lieth." In *Gill v. Harwood* 1587⁶ it was found for the plaintiff and it was moved in arrest of judgment that there was not any Consideration, for no time is limited for the forbearance, but it was general, which could be no commodity to the defendant for the same might be but *punctum temporis*. But the exception was not allowed for the debt in itself is a sufficient Consideration.

The scope of the action of assumpsit was enlarged by degrees. (1) *Indebitatus assumpsit* became concurrent with debt upon a simple contract in all cases. (2) Proof

¹ Pollock, *Contracts*, p. 150. (1588). ² Leon. 203, 205, p. 24.

³ "Action on the Case," pl. 105, 33 Hen. VIII (1542). ⁵ Godbolt's *Reports*, p. 98, pl. 112.

⁴ *Ibid.* pl. 5. ⁶ (29 Eliz.) 1 Leonard's

⁴ Manwood v. Burston *Reports*, p. 61.

of a promise implied in fact, *i.e.*, a promise was inferred from circumstantial evidence that a sufficient Consideration was given to support an action. (3) *Indebitatus assumpsit* was considered a proper form of action upon quasi-contracts for payment of money. In an anonymous case decided in 1592 (Dal. 84 pl. 35), Manwood C.B. objected to the count that the plaintiff ought to have said *quod postea assumpsit* for 'if he *assumed* at the time of the contract, then the debt lies and not *assumpsit* but if he assumed after the contract, then an action lies upon the *assumpsit*, otherwise not.' Whiddon and Southcote J. J. and Catlin C.J. all agree. The Consideration in this class of cases was accordingly described as a 'debt precedent'. The necessity of a subsequent promise is clearly shown by the case of Maylard v. Kester (1601, Moore 711) if such express promise were made, either debt on the original contract or *assumpsit* on the promise (*indebitatus assumpsit*) would lie¹. The plaintiff alleged that the defendant was indebted to him and had promised to pay the debt and the plaintiff relied on that promise and suffered a detriment owing to the failure on the part of the defendant to fulfil his promise.

The plaintiff in an action of debt had to give proof of a *quid pro quo* on his part ; in *assumpsit* the plaintiff had to prove agreement on the part of the defendant to bear some charge for him. Performance by the plaintiff must be shown in debt ; in many cases it was logical to lay down a similar rule. St. Germain gives an illustration in *Doctor and Student* that if *A* promises *B* that he will pay *B* £10 if he will give medicines to a poor man, *B* can sue on debt, but he must heal that man before any cause of debt can arise. But till *A* makes payment, it is not open to him to say that he has such a charge as will enable him to sue *B* by action of *assumpsit*. *B* is under no 'charge' merely in consequence of the agreement with *A*, because *B* cannot sue *A* on debt for the mere agreement to heal. The cases show that there is either

¹See Brooke's *Abridgement*. 27 Hen. VIII. pp. 24, 25.
 "Action on the Case," pl. 5.

money paid or an act done in consequence of the agreement between the parties to ground an action of debt or assumpsit. Holdsworth emphasises the point that 'during the sixteenth century the Court of Chancery was expanding the jurisdiction, and the judges of the King's Bench were trying to retain their jurisdiction over executory contracts.' Complaints were made from the Common Law Courts. Wolsey issued injunctions so very frequently that he was impeached for the reckless use of this prerogative. Sir Thomas More called a conference of judges to conciliate them¹. But these devices did not remedy the evil. This episode was the cause of the controversy. The *Doctor and Student* discussed the relation between Law and Equity with a bias in favour of equitable jurisdiction. The answer was given by a sergeant who favoured Common Law jurisdiction. The reply of a sergeant to the Doctor and Student is contained in Hargrave's *Law Tracts*, pp. 323, 328, written about 1523 A.D. "I marvel," he says, "what authority the Chancellor has to make such a writ (injunction) in the King's name and how he dare presume to make such a writ to let the King's subjects to sue his laws; which the King himself cannot do right wisely for he is sworn the contrary." He argues that the equity of the Chancellor is wholly uncertain and arbitrary; and that the Chancellors think the Common Law needs amendment, only because they are ecclesiastics and know not its goodness. "I perceive by your practice that you leave the Common Law of the realm and you presume much upon your own mind and think that your conceit is far better than the Common Law and therefore you make a bill of your conceit and put it into the Chancery saying that it is grounded upon conscience." There was an answer to this in the *Little Treatise Concerning Writs of Subpoena*². The argument was as follows: The jurisdiction of the Chancellor was granted by statute,

¹Moore's *Life of More*, p. of *Eng. Law*, Vol. III, pp. 166. 396—400;

²Hargrave *Law Tracts*, Kerly's *Equity*, pp. 90—93, (1787) p. 332; Reeves, *Hist.*

rudic a decisions and by practice. The cases in which a subpoena lies are given in detail and it is shown how in each case that subpoena was granted on reasonable grounds. In Edw. VI's reign students of the Common Law sent a petition to the Council complaining of the encroachment of the Chancery¹. "So it is . . . that now of late this Common Law of this realm partly by injunctions as well before verdicts, judgments and executions as after, and partly by writs of Subpoena issuing out of the King's Court of Chancery hath not been only stayed of their direct course, but also many times altered and violated by reason of decrees made in the said Court of Chancery, most grounded upon the laws civil and upon matters depending on the conscience and discretion of the hearers thereof who being civilians and not learned in the Common Laws determine weighty causes of this realm according to the said Civil Law or to their own conscience."

In Queen Elizabeth's reign the differences became more pronounced and controversy grew violent. A barrister was indicted under the Statute of Praemunire for applying for an injunction after a judgment at Common Law². Reeves says, it was resolved by all the judges that the plea was good and that there should be no further proceedings in equity; for though the Chancellor would not (as hath been said) examine the judgment, yet he would by his decree take away the effect of it, and as to precedents quoted from the previous reigns, they were treated without any regard as founded on the sole opinion of the Chancellor and passing *sub silentio*. They termed it not only an innovation but directly against the laws and statutes of the realm (namely statutes 27 Ed. III c. 1 and 4 Hen. IV. c. 22) against which no precedent could prevail (4 *Inst.* 86). From this it is plain that the Court of equity in Chancery was kept in strict subordination to the courts of law;

¹ Dacent 11, 48, 49; also *Acts of the Privy Council*, 1547—1550, Vol. I, p. 49. *tion*, (1846) Vol. I, p. 675; Reeves, *Hist. of Eng. Law*, Vol. III, pp. 735—737.

² Spence, *Equitable Jurisdic-*

and whenever it happened that they had been making precedents of a new and extraordinary kind, they received a check and animadversion which stamped everything in that court with the name of innovation and abuse that had not received sanction from the judges. Thus while admitting the legality of the Court of Chancery, the Common Law Court claimed to confine its jurisdiction within what they considered to be its legal limits. Spence¹ says : the actions of Covenant, debt and detinue were the only proceedings then in use to obtain a remedy, and executory contracts were wholly inapplicable to a vast number of cases of unperformed contracts ; and in debt and detinue a man might wage his law and thus defeat the plaintiff. The Court of Chancery was continually applied to in such cases and if some active measures had not been taken, the Court of Chancery would have absorbed the jurisdiction in cases purely legal. The remarks of Fairfax² J. are to the point.

In Y.B. 2 Hen. IV, we have the first action on assumpsit. The suit was dismissed because it was an agreement not under seal. But in 21 Hen. VII it was held that action on the case would lie for both misfeasance and malfeasance : “ If one covenants to build me a house by such a day and does not do it, I can have an action on the case for his non-feasance as well as if he built it imperfectly.” And “ so it is if one makes a bargain with me that I shall have his land to me and my heirs for £20, and he refuses to perform it : I shall have an action on the case, and there is no occasion for a subpoena³. ” Reeves says actions on the case now included *actiones in factum*, *utiles actiones* and *actiones prescriptis verbis*. Coke⁴ says: “ In an action on the case a man may declare his case as it really is, and he shall have a remedy for such part as legally requires a remedy ” ; and hence the origin of the modern action of assumpsit which is so

¹ *Equity*, Vol. I, p. 243. •

³ Fineux C. J. in Y.B. 21,

² Y. B. 21 Ed. IV, 23, 30, Hen. VII, fo. 41.

Reeves, *Hist. of Eng. Law*, ⁴ 10 Rep., p. 130.

Vol. III p. 246.

frequently resorted to. It is, however, only from the end of the reign of Queen Elizabeth that this kind of action became of general use and superseded the necessity of the interference of the Court of Chancery. Warren¹ says: "Two orders of legal mind have been created by this unnatural tearing asunder of the entire system of English Law. The Commons in the reigns of Henry IV and Henry V were repeatedly urging the entire suppression of the writ of *sub-poena* as a novelty devised by the subtilty of Chancellor Waltham against the form of the Common Law and subversive of it by determining pleas only by examination and oath of the parties according to the form of the Civil Law and the Law of Holy Church. The crisis was reached in the reign of James I². Coke decided in several cases that imprisonment for disobedience to injunctions issued by Chancery was unlawful³. The Courts of the Common Law saw clearly that their supremacy was in danger because if a party against whom judgment was given could ask the Court of Chancery to reverse it, it was quite subversive of the Common Law and no man would sue at Common Law but would begin originally in Chancery⁴.

The Court of Chancery maintained that injunctions did not interfere with the Common Law in any way because the judgment stood. All that the Chancellor was concerned with, was the conduct of the parties to the case which the Common Law courts did not take into Consideration⁵. This view is justified by cases of the type of *Courtney v. Glenvil*, 1615 (Croke Jac. 343). The facts were these: *G* had sold for £360 to *C* a jewel which was worth only £20. He had also sold to *C* three other jewels for £100. He took a bond for the payment in the name of one *H*. He then procured an action to be brought on the bond in *H*'s name. Judgment

¹ *Introduction to Law Studies*.
Vol. I, p. 487.

² Campbell, *Lives of the
Chancellors*, Vol. II. pp.
241—245.

³ See *Heath v. Rydley* 1614.

Cro. Jac. 335.

⁴ Throckmorton's case (1598)
⁵ *Institute*, pp. 124, 125.

⁵ Earl of Oxford's case, 1
White and Tudor 730.

was by consent entered for *H* out of Court. On appeal the Court of Common Law upheld the judgment. The Court of Chancery issued injunction against the enforcement of that judgment. Earl Elsmere gave the reason that by writ of *audita querela* the judges did in some cases play the Chancellors by reversing a judgment given. In the Earl of Oxford's case the argument was advanced that the judgment being based on a statute, no injunction could issue. The Earl of Elsmere retorted with much effect that Coke himself in *Bonham's case* had said (8 Reports 118) that Common Law can control Acts of Parliament if they were against right and reason, repugnant or impossible to be performed.

Assumpsit was brought quite frequently because there were more advantages in procedure than in debt. Assumpsit was not based like debt upon ground of a sum of money due in return for the grant of property or service. It was founded upon an undertaking the making of which had laid the plaintiff under an *obligation* which he must discharge. In debt the obligation could arise only if either party had done his part. In assumpsit attention was fixed on the making of mutual promises of the parties rather than on the performance of the promises by the parties. In assumpsit what is most important is the element of detriment which one party suffers owing to the restriction which he puts on his freedom of action by making the promise to the other party or by doing an act in order to fulfil his promise.

It is this element of deprivation of one's own liberty of action owing to the promise of that other which gives the right of action. Here performance on one side is not essential and in this way the enforcement of executory contracts was rendered possible. This idea of detriment is seen clearly in decided cases. In *Norwood v. Read* (Plowden 181), decided in 1557-8, assumpsit was allowed against executors for a debt due by a testator and it was debated whether or no an action on the case would lie against executors upon such an assumption of the testator which assumption (it was said by the defendants) was

Executory
Contracts.

no other than a simple contract and if the executors should be charged by such a contract, by the same reason they should be charged by every contract executory as well for debt as for other things. For every contract executory is an assumpsit in itself and it would be inconvenient to charge them as well by contracts made by parol in pais as by specialities, for of the former they cannot have knowledge. It was finally settled that assumpsit would lie upon *any debt*. In Slade's case, in 1603, it was resolved that every contract executory imports in itself an assumpsit, for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it and therefore when one sells any goods to another and agrees to deliver them at a day to come, and the other in Consideration thereof agrees to pay so much money on such a day, in that case, both parties may have an action of debt or an action on the case on assumpsit, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as actions of debt and therewith agrees with the judgment in *Read v. Norwood*¹. In *Nichols v. Raynberd*², *N* brought an assumpsit against *R* declaring that in Consideration that *N* promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings; adjudged for the plaintiff in both courts that the plaintiff need not aver delivery of the cow because it is a promise for a promise. It is to be carefully noted that the promises must be at one instant, for otherwise they will be both naked promises (*nuda pacta*).

When the action of assumpsit became distinct and the word Consideration was used in Courts of Common Law and Equity, the modern law of contract was formed. The word consideration got its technical meaning in English Law. At Common Law it was used to express the conditions under which the action of assumpsit was allowed. The action of assumpsit was allowed upon

¹Fl. Com. 128, p. 509.

²(1615) Hobart 88; Finch, *Selected Cases*, 336.

executed and executory contracts. Similarly Consideration, which must be essential to every simple contract to ground an action, might be executed or executory. The defendant was liable not because he got a benefit but because the plaintiff had suffered detriment. It is not necessary that defendant should get any benefit at all. The form of action required that detriment which the plaintiff has suffered must be the result of the promise made to the defendant, because it is to the defendant that the promise was given. The promisee must be the person at whose instance the detriment was suffered.

The action of assumpsit has been extended to every case where an obligation arises from natural reason and the just construction of law¹. Promise in law only exists where there is no express stipulation between the parties. It comprehends all presumptive undertakings which, though they were not actually made, yet constantly arise from this general intendment of courts of judicature that every man be engaged to perform what his duty and justice require². It has been extended as regards actual promises to cases of merely moral obligation.

Implied agreements are usually the subject of such actions as those which arise where a person has done work and labour for another or where goods are sold without any express agreement as to remuneration. Another instance of implied obligation is where one had and received money belonging to another without any valuable Consideration given on the receiver's part. Another is where a man has laid out and expended money for the use of another at his request ; when upon a stated account between merchants and others a balance appears due from the one to the other, but there has been no actual promise to pay³. These are what are called common money counts. A Consideration of some sort is absolutely necessary. There must be *qui pro quo* in every contract⁴.

¹Cowper, pp. 290, 294,

²3 Blackstone, *Comm.* 316.

³3 Blackstone, *Comm.* 162—164.

⁴Coke o

*Nudum
Pactum.*

An agreement, not under seal, to do or pay anything on one side without any compensation on the other is absolutely void at law and law will not enforce such an agreement¹. It is called *nudum pactum*. Bracton introduced this expression from Roman Law². Bracton's idea of *nudum pactum* was quite different from what is commonly understood in Roman Law. In Roman Law one kind of *nudum pactum* depended upon the doctrine as to stipulation by question and answer; which kind of contracts were binding on the parties, if certain forms and ceremonies were observed. Thus in Roman Law it was quite immaterial whether Consideration existed or not in this sense of *nudum pactum*. Justinian's *Institute* III 16 pr. Bracton (f. 15 b) has mentioned the contract of stipulation by question and answer as if it had been introduced into English Law. Fonblanque³ says that Common Law does not appear to have been in any degree influenced by the notion of Civil Law in defining what constitutes *nudum pactum*. The plaintiff is bound to show a Consideration in the shape of something either beneficial to the opposite party or detriment to himself. "The action of assumpsit is governed by the same rules" says Spence⁴ "as were actions *bona fideo* under the Roman system of procedure."

*Action of
Deceit.*

Assumpsit was allowed for the recovery of damage whenever there was a breach made of an express or implied promise not made by deed⁵. It has developed out of action on the case. When a promise was not fulfilled, it was treated like deceit⁶. Originally it was absolutely necessary that some Consideration must be given when the promise was made if action of assumpsit was to be brought⁷. Gradually mutual promises were

¹ *Doctor and Student*, Dial. II, c. 24, p. 177; 2 Blackstone *Comm.* 445.

² f. 159, II, 16.a.

³ *Treatise on Equity*. (1820) 5th ed., 1 vol., p. 335, Note A.

⁴ Vol. I, p. 246.

⁵ Comyn's *Digest* "Action

upon the case upon Assumpsit." 1800, I Vol., pp. 174--216.

⁶ Bacon, *Abridgement*, "Actions on the Case." 1807, I Vol. pp. 72--97.

⁷ Fitz: *Natura Brevium*, p. 94.

regarded as sufficient Consideration for each other. Slade's case¹ decided that where a debt was owing, a promise to pay that debt was implied and action of assumpsit was the proper remedy. Common assumpsits included : (1) *Indebitatus Assumpsit*, which was a promise based on a precedent debt, *e.g.*, goods sold ; (2) *Quantum meruit* ; (3) *Quantum valebant* where for the work done the amount to be paid has to be determined ; (4) *Insimul computassent*, where the action was on an account stated and agreed to between the parties.

The assumpsit on liability to pay was quite distinct from *indebitatus assumpsit* because in the latter case there was an existing debt for the payment of which promise was implied and it was pleaded generally: but in the case of liability to pay the plaintiff was bound to set out all the facts under which the defendant was liable to pay by pleading specially, *e.g.*, liability arose from a promissory note.

Special assumpsits were allowed on the following Special promises : (1) to marry or do some personal service ; Assumpsits. (2) to provide necessaries to the plaintiff or some third person ; (3) of retainer to serve or employ ; (4) to do work, *e.g.*, promise to attend the sick by a doctor ; (5) forbearance to sue or to give time for payment of debt ; (6) in sale or exchange of goods to accept and deliver the goods ; (7) on bailment of goods ; (8) to sell or assign lands ; (9) on real or personal securities ; (10) to account for profits of lands.

The plaintiff had the option to sue either in debt or assumpsit. Debt was always allowed in every case where *indebitatus* assumpsit was allowed².

Some agreements were so important that they were required to be in writing and a mere verbal promise was not enough to prove the agreement. The Statute of Frauds (29 Car. II) enacted that in five cases verbal promise shall be of no effect, unless some note or memorandum of it be made in writing : Statute of Frauds.

¹1603 4 Co. Rep. 92a.

1 Doug. 137.

²Longchamp v. Kenny, 1779,

(1) Where an executor or administrator promises to answer for damages out of his own estate.

(2) Where a man undertakes to answer for the debt, default or miscarriage of another.

(3) Where any agreement is made in Consideration of marriage.

(4) Where any contract or sale is made of lands, tenements or hereditaments or any interest therein.

(5) Where any agreement is made which is not to be performed within a year from the making thereof.

In these five cases verbal assumpsit is void.

Pleadings in
Action of
Assumpsit.

The plaintiff must set forth everything essential to the gist of the action with reasonable certainty so that the court may know the grounds for which the action is brought. The plaintiff must show circumstances from which the liability of the defendant to pay can be inferred¹.

Considera-
tion and
Law
Merchant.

It is under the influence of the action of assumpsit that Law Merchant has been incorporated into Common Law. In the time of Edward III ordinary transactions existed among merchants ; a distinct law prevailed ; it was liberal and expeditious ; it was called *Lex Mercatoria*. It prevailed in London and other commercial towns during the Anglo-Saxon period. By Statute 27 Ed. III (ch. 2) in each town where staple was ordained, a Mayor skilled in Law Merchant was chosen. Coke says² : " these Courts were ancient " ; Bracton mentions that Pie Poudre courts to which merchants referred their disputes were firmly established. Bracton (f. 334. Fortesque) expressly mentions *lex mercatoria*³. In common societies of merchants and mutual contracts, says Selden⁴, equity and good conscience rather than strict law were required. Merchants had been specially

¹Bacon, *Ab; Pleas and Pleading*, Gwillim and Dodd.

²4 *Int.* 237.

³*De Laudibus*, c 32, *Regis*

Brevium, f. 135a: Fitz *Natura Brevium*, 117 D.

⁴*Notes on Fortesque*, p. 35.

favoured by allowing summary process in the King's Court. Common Law had very little to do with the merchant and his courts. He was protected by his special court and could appeal to the Chancellor and the Council. The law was Customary Law known to the merchants who, if need be, could inform the King's Court of its contents¹. The rule was that one townsman was liable as a kind of surety for the debt of his fellow-townsman. Complete incorporation of the Law Merchant with Common Law was not effected till the time of Lord Mansfield. Up to that time law business was divided between the courts of law and equity. The law was not systematised. Lord Mansfield was called the founder of the commercial law of England. Law Merchant had ceased to be a separate body of law administered by separate courts ; it was made up of nothing but usages of merchants and traders ratified by the decisions of courts of law which upon such usages being proved before them adopted them as settled law².

Law Merchant as it existed through the Middle Ages was a body of cosmopolitan customs resting its recognition on its intrinsic reasonableness, as is seen by the adoption of usages. It was often considered part of the Law of Nature. Sir John Davies³ says : " The Law Merchant, as it is a part of the law of nature and nations is universal and one and the same in all countries of the world." In 1473 Bishop Stillington laid down⁴ that suits between merchant strangers " ought to be determined by the law of nature in the Chancery." The king has jurisdiction by the fact of the stranger's coming into the realm but he must exercise it according to the law of nature which some call the Law Merchant and which is universal throughout the world. In Malynes's *Lex Mercatoria* (1656) it is stated that ' Law Merchant has always been found *semper eadem*, that is constant and permanent, without abrogation, according to the most

¹ *Selected Pleas in Manorial Courts*, S. S. p. 132.

³ In his book *Concerning Impositions*, ch. 3, printed in 1656

² *Goodwin, v. Roberts*, 1875, L. R., 10 Ex. 337.

⁴ Y.B. 13 Ed. IV., 9. pl. 5.

ancient customs concurring with the Law of Nations in all countries. Great reverence is due unto law at all times and hath been in all ages. Solon caused the Athenians to swear to the observance of his laws during the time of an hundred years. Licurgus did embrace a voluntary perpetual exile to have his laws observed by the Lacedemonians, until his return, intending never to return and the Romans did suffer their old law of the XII Tables though unjust in many points to decay little by little rather than to make a sudden alteration of it, tending to the contempt of laws. Greater reverence is due to the Law Merchant which has always proved firm and stable.'

In practice the Chancellor referred such causes to be determined by a commission of merchants. Common Law began to recognise Law Merchant rather as a Personal Law 32 and 33 Ed. I. 377. Law Merchant, as it is a part of the Law of Nature and of Nations, is universal and the same in all the countries in the world. Y.B. 8 Ed. IV 12.—Yelverton J. said he did not see why in the absence of authority the King's judges should not resort to the law of nature which is the ground of all laws. Blackburn¹ writes that as the courts of the staple decayed away and the foreign merchants ceased to live subject to a peculiar law, those parts of Law Merchant which differed from the Common Law either fell into disuse or were adopted into the Common Law as the custom of merchants, and after a time began to appear in the books of Common Law. How this great change was brought about does not appear, but though Bills of Exchange were in common use among merchants in the 13th century, the first mention of one is in 3 *Coke's Reports*. James I (*Maynay v. Collins*, case 7 P. 186). A new bill may be filed by leave of the court when the old one is lost. See also Y.B. 21 and 22 Ed. I, pp. 74—76. One *B* brought a writ of debt against *C* and pleaded according to Law Merchant. *C* denied the words of the court and said he had paid part and gave bond for

¹ *Contract of Sale*, 1845, p. 208.

the rest ; and to prove that, he produced a tally and a good suit. Lord Blackburn¹ says: "There is no part of the history of English Law more obscure than that connected with the common maxim that the law Merchant is part of the law of the land." The Chancellor² said : " This suit is brought by an alien merchant who is come by safe conduct here, he is not bound to sue by the Law of the land, to abide the trial of twelve men and other forms of the law of the land ; but he ought to sue here (in the Star Chamber) and it shall be determined by the Law of Nature in Chancery and he may sue from hour to hour for the despatch of merchants."

To say that Law Merchant is a branch of the law of nations only means that it is free from the technical rules of the Common Law. Buller³ J. said : "*lex mercatoria* is a system of equity and governed in all its parts, by plain justice and good faith." Blackstone said it was impossible that the maritime laws of any one realm should be sufficient for the ordering of affairs and traffic of merchants⁴. In *Luke v. Lyde* (2 Burrows, 887) Lord Mansfield said : " Maritime Law is not the law of a particular country but the general law of nations."

The historical study of the doctrine of Consideration shows its delictual origin. In Herne's *Pleader* (1657, p. 130) an ordinary form of declaration in *assumpsit* runs as follows : " Notwithstanding the said defendant his promise and assumption little regarding, but meaning and intending him, the said plaintiff craftily and subtilly to deceive and defraud the said £9 : 10 (the price of the goods sold) according to his promise and assumption aforesaid to the said plaintiff has not yet paid or any ways contended."

Salmond⁵ says : " The English Law of Contract assumes a compromise between two different and competing

¹Smith's *Mercantile Law*, 10th Ed., Introduction ; "Contract of Sale," p. 207.

²In Y.B. 13 Ed. IV, 9.

³*Master v. Miller* I. S. L. Cases 797, (11th Ed.)

⁴1 *Commentaries*, p. 273.

⁵*Essays*, p. 196.

theories of contractual obligation. There are two distinct methods in which the law may deal with promises. The first is the enforcement of performance or of payment of the pecuniary equivalent of performance. The second is the enforcement of compensation for all injury caused by the making of a promise that has not been kept. The difference between these two principles of contractual obligation appears more clearly in respect of the measures of damages for breach of contract. Adopting the first, the plaintiff (the promisee) should be put in as good a position as if the contract had been performed. Adopting the second he should be put in as good a position as if the contract had not been made. The first principle looks to the result of the breach of contract merely ; the second looks at the result of the whole transaction.' In the treatment of the doctrine both these principles are adopted. Has the plaintiff any right of action against the defendant at all ? If the answer is in the affirmative, he must show that he has suffered some legal detriment by relying on the defendant's promise. The next question is about the amount of damages to be awarded. This is measured by reference to the gain which the promisee would have made if the contract were performed. The damages are assessed on the contractual principle of giving compensation to the plaintiff owing to defendant's default.

The above view is supported by the study of decided cases. In the medieval period the action of *assumpsit* was very flexible and various agreements were enforced through this action if the plaintiff could show that he had incurred a detriment by relying on the promise. This generalisation was rendered possible :—(1) Owing to the keen rivalry for business among lawyers. There was a demand for an extended remedy on business agreements and pleaders were very eager to break the monopoly of ecclesiastical jurisdiction in matters of faith, and to compete on terms of equality with the court of Chancery. (2) Owing to the overlapping of the forms of action. In *Doctor and Student*, c. 24, it is stated that 'it is not much argued in the Laws of England what diversity is

between a contract, a concord and a promise, etc. The law looks to the effect of the matter argued, and not to terms.'

The general idea of Consideration was formed about the middle of the 15th century. At that time *nudum pactum* had lost its old meaning. *Nudum pactum* was used to express an agreement which was not made by speciality, in order to give validity to an action of Covenant. The word Consideration was employed in the technical sense by the lawyers of that time. Early writers are fond of using the words *Considerare consideratio*, meaning judgment of a court of justice. In the judgments of Common Law the use of the words 'it is Considered' is very frequent. By the Judicature Act, 1873, judgments are said to be adjudged.

In the Year Books there is not a single case dealing with the doctrine of Consideration during the first half of the 15th century. In 1336 Y. B. 10 Ed. III, p. 23, the phrase *quid pro quo* is mentioned for the first time. Continental documents do not contain this word at all. In 11 and 12 Ed. III p. 586, the words *quid pro quo* occur. The facts were that a writ of debt was brought against one and he counted that the plaintiff by Covenant between him and the defendant had been made his attorney for ten years taking 20 shillings for every year which was in arrear. Pole :—'This count begins by a Covenant and ends with a duty, judgment of such a count was warranted.' This objection was overruled. Pole :—'He has nothing showing the Covenant.' Scharshulle :—'If one were to count simply on a grant of a debt, he would not be received without a speciality ; but here you have his service for his allowance of which knowledge may be had and you have *quid pro quo*.' Whereupon Pole waged his law that he owed nothing. In (1439) Y.B. 37 Hen. VI, p. 8, pl. 18, the decision of Danvars J. shows that he had grasped the main idea of the modern doctrine of Consideration. The two points are : (1) that when a person does something at the request of another.

the law does not ask whether it is for his apparent benefit but assumes that it is of some value, and (2) the words *quid pro quo* express that meaning. In Y.B. 37 Hen. VI 13 pl. 3, an assignment of debt (not being by way of satisfaction for an existing debt) was no Consideration (*quid pro quo*) for a bond, for no duty was vested in the assignee. The Court of Chancery held that the bond must be delivered up. In Y.B. 3 Hen. VI 36 pl. 33 action of assumpsit was brought against a contractor for not building a mill as required by the promise. The defendant pleaded that there was no express term of payment for the work done. The court upheld the plea. Brenchesley J. said, 'Peradventure if he had counted or mentioned in the writ that the thing had been commenced and, owing to negligence, it was left unfinished, it would have been otherwise.' Babington C. J. and Cockaine J. were in favour of the action. The ground of the decision seems to have been that there was no contract of service to create a duty to do the work¹.

In *Doctor and Stueent*², the notion of *nudum pactum* is given. "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to build a house or to do him such certain service and nothing is assigned for the money, for the building, nor for the service; these are called naked promises because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed. Also if I promise to another to keep him such certain goods safely to such a time and after I refuse to take them, there lieth no action against me for it." The word Consideration is mentioned in *Doctor and Student*, e.g.: "But if his promise be so naked that there is no manner of Consideration why it should be made, then I think him not bound to perform it." But the word Consideration in that dialogue is not used in the technical sense.

¹Roll Abr. 593, pl. 7, citing 17 Ed. IV. 6. ²Dial. II c. 24.

In *Sharington v. Strotton*¹ there is a full discussion of Consideration by that name. The point at issue was whether natural love and affection constituted a good Consideration to support a Covenant to stand seised to uses. It was decided that the Consideration of natural love and affection was sufficient as between kindred to support a Covenant to stand seised. This case shows that uses were recognised and enforced before the Statute of Uses was passed.

The case also suggests that the general concep- Did the
tion and name of Consideration might have origi- doctrine
nated in the Court of Chancery and that the Law originate in
of Uses had been imported into the Law of Con- Chancery ?
tract rather than that it was developed by Com-
mon Law Courts. If we are right in holding that
the doctrine of Consideration is of Chancery origin
and was developed out of the Law of Uses, it is quite
natural to suggest that it is very closely connected with
the Roman *Causa*. This view was first put forward by
Sir F. Pollock. Salmond² gives reasons for the adop-
tion of this view. He says that the idea of Consideration
was introduced into the action of assumpsit from without
and inquires into the origin. The idea of Consideration
was *first* applied in courts of equity and was the most
important part of the doctrine of Uses. When convey-
ance was made by transmutation of possession as a
feoffment with livery of seisin, a fine, a recovery or a
Consideration was not required to support a use declared
upon the instrument, for at law feoffer had parted with
his interest, and there was no equity or reason why the
Court of Chancery should, against the expressed will of
the donor, take the use from the donee, and give it back
to the donor. In other words, uses, annexed to a per-
fect gift, however gratuitous, were enforced. But
where there was no transmutation of possession it was
different. Becon in his reading of the Statute of Uses
(p. 14) says: "No Court of Conscience will enforce

¹Plowden's *Report* Mich.
Term, 7 and 8 Eliz. p. 298.

²*Essays*, p. 213.

donum gratuitum, though the intent appear never so clearly, where it is not executed or sufficiently passed by law. When there was a valuable Consideration, a parol promise or declaration of uses was, it seems, always enforced." In Covenants to stand seised to uses, in conveyances without declaration of uses, and in alienation of land subject to uses, Consideration was required. Equitable jurisdiction was exercised in the Law of Uses. It is quite possible that the jurisdiction was exercised in the case of contracts which required Consideration. There are reasons for believing that Consideration was originally in equity, as it subsequently was at law, a principle of contract. There was equitable jurisdiction in contracts, *e.g.* in Y.B. 8 Ed. IV. 4 the Chancellor claimed to exercise jurisdiction over suits *pro fidei laesione*. In 21 Ed. IV. 23 Fairfax J. urged that the action should be extended to prevent the Chancellor from interfering. In *Diversite de courts* (*tit. Chancerie*) it is enacted "that a man can have remedy in the Chancery for Covenants without specialty, if the party has sufficient proof of the Covenant without remedy at Common Law." In Y.B. 1 Hen. VII. Fineaux J. held that an action would lie for non-feasance and there would be no necessity for a subpoena. Brooke¹ says: "But by this remedy he would get nothing but damages; but by subpoena, as it is said, the Chancellor may compel him to convey the estate or imprison him. The jurisdiction is recognised in Doctor and Student² on the ground of conscience. Spence³ says, bills for specific performance of contract for sale of land (for which damages were not substitute) are amongst the earliest that are recorded in the Court of Chancery⁴. This jurisdiction would be more readily entertained as it was analogous to that by which a

¹ *Abridgement*: "Trespas on the Case", p. 72.

² *Dial.* 1, ch. 21.

³ *1 Equity*, p. 646.

⁴ *Cal.* II. 2 temp. Rich. 11 and Lord Scāles v. Felbridge, *Cal.* II., p. 26.

person who entered into a contract by bargain and sale was held to be trustee for the bargainee. The early bills in Chancery show that the term Consideration or Cause was used in reference to contracts in the reign of Edw. IV. There is nothing to show that the word Consideration was used in its technical meaning.

The question is often put as to the source from which equity derived it. The general answer is that it is of civil law origin. Money paid or property delivered *sine causa* was invalid. In the *Digest*¹ it is stated, (Ulpianus, on Sabinus), 'There is a right of *Condictio* in the following cases: (1) where a person makes a promise without ground or where he pays what was not owing. Where, however, he has promised without ground, he cannot bring a *condictio* for values which he never gave but only for the *obligatio* itself². (2) Whether the promise was made without ground at the outset or there was a ground for the promise which is exhausted or has failed, the rule is that it is a case for a *condictio*. (3) It is acknowledged law that a *condictio* for anything can be brought against a man only where it has come to his hands either on no just ground or under circumstances which come to the same thing.' This rule was applied to formal and informal contracts. *Causa* was not restricted to *quid pro quo*, for it was not required for a stipulation. It included any adequate motive or reason. If a promise was made under a mistake, or for a Consideration which failed, it was invalid.

Source from which Equity derived the Doctrine.

In Canon Law the distinction between pact and contract was not kept, and this was the prevailing rule in Europe. Stair says: "The Romans would second none with their civil authority but such as had a solemnity of words by way of stipulation or unless there was an intervention of deed or thing beside the consent, or a contract allowed of law, or such other paction as it specially confirmed, without all of which it was called

Canon Law.

¹Book XII. ch. 7. 1.

²*Institutes* 1. 10. 7.

nudum pactum. We shall not insist on this because the common custom of nations hath resiled therefrom, following the Canon Law by which every paction produceth action." In Scotland a special statute of Session (Nov. 27, 1592) was passed which rendered all pactions and promises effectual and binding in a Court of Law. The Canon Law gave prominence to *causa*. Molina, a jurist who flourished in the 16th century, gives several examples of the rule¹.

Various
Views.

Salmond states that 'it is most probable to suppose that the rule in question entered Common Law from the Canon Law and through equity.' This view is strengthened by the fact that Chancellors were as a rule selected from the ecclesiastical body in the early period of history. Ames does not accept this view: (1) He admits that the word Consideration was first used in equity, but it was not given the technical meaning before the 16th century² (2) Consideration in its essence, whether in the form of debt or detriment, is of Common Law growth. Uses arising from bargain or Covenant are of later introduction and cannot have any influence on the Law of assumpsit. In Y. B. (1505) 21 Hen. VIII. pl. 30 the question of uses arising out of bargain was discussed. In *Sharrington v. Strotton*³ it was decided that Consideration of blood was not sufficient to create a use. Ames, on the contrary, is of opinion 'that the Consideration in Common Law action of assumpsit was borrowed by equity in order to enforce oral uses by bargain. The bargain and sale of a lease and agreement to stand seised were not executory contracts but conveyances.' At law it was not possible to sue the bargainor or covenantor. The grant of the use was assimilated to the grant of a chattel or money. A *quid pro quo* was required to a transfer of a chattel or a debt as it was also necessary in grant of a use.

¹ *De Justitia*, Disput., 257.

cery in the reign of Elizabeth

² 31 Hen. VI. Fitz, *Ab.* pl.

LXVIII, (fo. ed.)

23, *Fowler v. Iwardby*, *Calendar of Proceedings in Chan-*

³ (1565) Plowden, p. 295.

Justice Holmes is of opinion that the origin of Consideration is nothing else than a generalisation from the technical requirements of the action of debt. He says ¹ that 'a careful consideration of the chronological order of the cases in the Year Books will show that the doctrine was fully developed in debt before any mention of it in equity can be found.' One method of proving debt was by oath of sufficient men. Compurgation was one method of defence; this was wager of law. These men were what we find termed in medieval practice the good suit. Holmes tries to show the connection between the good suit or *secta* of medieval days with the modern doctrine of Consideration. He says ²: "The single fact that a Consideration was never required for contracts under seal, unless Fleta is to be trusted against the great weight of nearly contemporaneous evidence, goes far to show that the rule cannot have originated on grounds of policy as a rule of substantive law. And, conversely, the coincidence of the doctrine with a peculiar mode of procedure points very strongly to the *probability* that the peculiar requirement and the peculiar procedure were connected." "The rule," he adds, "that witnesses could only swear to facts within their knowledge, coupled with the accident that these witnesses were not used in transactions which might create a debt, except for a particular fact, namely, delivery of property, together with the further accident that this delivery was *quid pro quo*, was equivalent to the rule that when a debt was proved by witnesses there must be *quid pro quo*. But these debts proved by witnesses instead of by deed are what we call simple contract debts and thus beginning with debt and subsequently extending itself to other contracts is established our peculiar and most interesting doctrine that every simple contract must have a Consideration.'

The mode of proof soon changed but as late as the reign of Queen Elizabeth we find a trace of this original

¹ *Common Law*, p. 253.

² *Ibid*, p. 254.

connection. It is said¹: "The Common Law requires that there should be a new cause (Consideration) whereof the country may have intelligence or knowledge for the trial of it, if need be, so that it is necessary for the public weal." Lord Mansfield said²: "I take it that the ancient notion about the want of Consideration was for the sake of evidence only for when it is reduced to writing as in Covenants, specialities, bonds, etc., there was no objection to the want of Consideration." If it should be objected that the presiding argument is necessarily confined to debt, whereas Consideration is required in all simple contracts, the answer is that "in all probability the rule originated with debt and spread from debt to other contracts³". It is not clear that the proof *per sectam* had become of any value in the King's Court, at least before Common Law had been firmly recognised and established; Glanville says⁴: 'Debt arising either from a purchase or a borrowing are usually substantiated by the general mode of proof in court; in other words either by writing or by duel.' Bracton⁵ says: likewise not by a *secta* which may be made through one's household and intimate friends, *for a secta does not constitute a proof*, but it raises a slight presumption and it is overcome by a proof to the contrary and by a defence at law. In answer to this, Holmes⁶ says it is no doubt true as Glanville says (X. c. 17) that the usual mode of proof was by writing or by duel, and the King's Court did not generally give protection to private agreements made anywhere except in the Court of the king. 'But it can hardly be that debts were never established by witnesses in his time, in view of the continuous evidence from Bracton onwards.' He also says the good suit of the later reports was the descendant of the Saxon transaction witnesses as it has been shown that Glanville's

¹Sharrington v. Strotton, Plowden 298, p. 302.

²Pillans v. Van Mierop, 3 Burrows, 1663, 1669.

³Holmes Common Law, p. 259.

⁴X. c. 17.

⁵f. 400 b. s. 9.

⁶Common Law, p. 257.

secta was. A hundred years later, Bracton shows that the *secta* had degenerated to the retainers and household of the party, and their oath could raise but a slight presumption. The view of Justice Holmes is summed up thus the *quid pro quo* of debt was the true origin of the doctrine of Consideration. There is a very powerful influence of the peculiar function of *secta* and the transaction—witnesses of Anglo-Norman procedure which have contributed very largely to the development of the doctrine.

The above view has been criticised by eminent writers. Maitland's Pollock and Maitland¹ give their dissent from the view Criticism because the demand for *secta* was not confined to action of debt. Any person who felt himself injured by any tortious act such as assault must produce a *secta*, and it is not possible to have official witnesses or transaction-witnesses near at hand. There is no ground to believe the statement that in those days every private transaction, such as borrowing, was done before *official* witnesses who must be present during such occasion; from the cases it is clear that the doctrine of Consideration had not originated during the period mentioned.

Another critic is Salmond who² says that the view Salmond's advanced by Justice Holmes that the modern rule as to Criticism. Consideration is merely a modification of the ancient requirement of *quid pro quo* in action of debt cannot be accepted because : (1) such a view is founded on mistake as to the original contents of the idea of Consideration. (2) There is a very great gap between the idea of Consideration and the idea of *quid pro quo*. (3) In the action of debt *quid pro quo* was rendered necessary; while Consideration as an element of agreement enforced by law was first required in *assumpsit*.

Langdell³ brings out the difference very clearly. 'In Langdell's debt,' he says, 'the Consideration must inure to the view,

¹*Hist. of Eng. Law*, Vol. II, 216.

²*Summary of Law of Contracts*, s. 64.

³*Essays*, pp. 221--222.

benefit of the debtor, while in *assumpsit* it may inure to the benefit of the promisor or of some third person or to the benefit of no one. It was by degrees that this difference between debt and *assumpsit* was developed. The doctrine of Consideration had been established in the law of property before it appeared in the law of contracts. It is scarcely probable that it was derived from the action of debt. It is commonly supposed that the modification by which *quid pro quo* became Consideration was the recognition of detriment to the promisee as well as benefit to the promisor. But Prisot¹ C. J. added that in the case of goods sold, though not of land, the buyer may take the goods. This follows from the theory of reciprocal grants.' These two ideas lived quite independently of each other. In Y.B. 27 Hen. VIII. 24 it is stated 'I understand that one cannot have a writ of debt, except when there is a contract, for the defendant has not *quid pro quo*, but the action is founded solely on the assumption which sounds merely in Covenant.' In *Sydenham v. Worthington*² the facts were that *A* an attorney of *B* became bound for *B* at his own instance. *A* was forced to pay the money. *B* undertook to discharge *A* therefrom. Held, that the action lay in *assumpsit*; it was not necessary that they should contract at the same instant; but it sufficed if there was inducement enough to the promise and although it was precedent, that was not material, otherwise in debt it is requisite that the benefit come to the party, otherwise for want of a *quid pro quo* debt does not lie. From these cases it appears, says Salmond, that it is not possible to say that *assumpsit* is a mere modification of debt. These two cases are quite distinct and have different sources.

Ames Starts
a new
Theory.

Ames says³: "That the theory of Consideration is a modification of *quid pro quo* is not tenable. On the other hand, the Consideration of *Indebitatus Assumpsit* was identical with *quid pro quo*, and not a modification of it."

¹Y. B. Mich. 37 Hen. VI. 8
pl. 18.

²27 and 28 Eliz. Dyer 272 n.

³25 *Law Magazine and Review*, p. 151.

On the other hand, he says; "the Consideration of detriment was developed in a field of the law remote from debt and in view of the sharp contrast that has always been drawn between special assumpsit and debt, it is impossible to believe that the basis of one action was evolved from that of the other."

The view that the doctrine of Consideration was borrowed from Equity as a modification of the Roman *Causa* is advanced by Salmond who is of opinion that the idea of Consideration was first introduced into action of assumpsit from outside. It seems, he writes, pretty clear that the idea in question received its first application from the Court of Chancery where it formed an essential part of the equitable doctrine of uses. The principle was very largely used in equity. Good Consideration was required in covenants to stand seised to uses; in conveyances without declaration of uses; and in the transfer of landed property subject to uses. The doctrine of Consideration was used largely in equitable jurisdiction but its application was not confined to it alone; because there are cases which show that Consideration was a principle of contract also.

Ames does not accept the view of Salmond and says¹ that the word Consideration was doubtless used in equity but it had not acquired its technical meaning before the 16th century, *e.g.* Y.B. 12 Ed. IV. Mich. pl. 2, per Coke, shows that the word Consideration had not acquired its technical meaning at Common Law. Y.B. 20 Hen. VII. Mich. pl. 20 contains the expression "bargain on autre Consideration." *Foscelin v. Sheldon*, decided in 1557, contains the following:—"A promise is said to be made 'in Consideration of².'" *Pole v. Richard*³ contains the expression—resignation of a benefice for 'divers causes and Consideration.' In 1533 Hale said,

¹25 *Law Magazine and Review*, p. 151.

²See also Y.B. 31 Hen. VI. 10 pl. 20.

Fitz. Ab. Sub. p. pl. 23;

Fowler v. Iwardby, 1 Cal., ch. LXVIII; Y.B. 20 Hen. VII.

³1 Cal., ch. LXXXVIII.

"A man cannot change a use by a Covenant which is executed before, as Covenant to be seised to the use of W. S. because until *Sherrington v. Strotton*¹ Consideration of blood was not sufficient to create a use." Consideration in its essence, whether in the form of detriment or debt, is a Common Law growth. Uses arising upon a bargain or covenant were introduced after the action of assumpsit was settled and so cannot have produced any influence upon it at all. In Y.B. 21 Hen. VII. 18 pl. 30 the action of assumpsit was quite settled. In 1505 the validity of uses resulting from a bargain or covenant was in dispute². The doctrine of Consideration was not borrowed from equity at all, but on the contrary Ames seems to suggest that the Consideration which gave validity to parol uses by bargain and agreement was borrowed by equity from the Common Law ; because the bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts but conveyances. No action could be brought against a bargainor or covenantor³. The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. He could make livery of seisin and retain the use ; gradually he got the right to grant away the use and keep the seisin. The grant of the use was further more assimilated to the grant of a chattel or money. A *quid pro quo* or a deed was essential to the transfer of a chattel, or the grant of a debt ; so it was argued that there should be *quid pro quo* in the grant of a use⁴.

Harriman's
View.

Harriman⁵ says: "The doctrine of Consideration grew up by more or less accidental and obscure historical evolution in the juridical process of furnishing remedies in the theory of the action of assumpsit. The judges were influenced by the maxim *en nudo pacto non oritur*

¹Decided in 1566, *Plowden* 298.

²*Brooke, Abridgement Feoff.* p. 54.

³*Plowden*, pp. 298, 308.

⁴*Bacon's Law Tracts*, "Statute of Uses," p. 305.

⁵*Contracts* p. 118, 2nd. ed. (Boston Mass) 1901.

actio and by analogy of *quid pro quo* in action of debt and by delictual analogy of trespass on the case, which required a remedy where there was a wrong done." According to him the sources of the idea of Consideration are : (1) action of debt, (2) action of *assumpsit* in Common Law Courts, and (3) the peculiar doctrines which were prevalent in Courts of Equity in their application of equitable relief.

Markby¹ says : " A contract under seal is enforceable without Consideration ; a contract not under seal is not enforceable without Consideration ; it is entirely indifferent whether Consideration is of any value or not. The only rational and consistent explanation of these things is that the question is *really one of form*. The being under seal or not is as purely a matter of form as can be, and how can it be a matter of substance to require as a Consideration that which may be absolutely of no value. As a matter of form, these things are both important. The form of a deed is a sure indication that the parties contemplated a legal relation, the form of a bargain or giving a *quid pro quo* is not conclusive but a useful indication of the intention of the parties to create a legal relation ; but it is erroneous to conclude that no legal relation can be established without Consideration." He is of opinion that it is impossible to apply this doctrine of Consideration as a test of legal liability with consistency and justice. It can be regarded as an indication but not a test to show that the parties when they were entering into a transaction had intended to create a legal relation.

Anson² says, the true function of Consideration is evidence that a promise was intended to be binding. It is a hard matter, he says, (p. 60) to say how Consideration came to form the basis upon which the validity of informal promises might rest. " Probably the *quid pro quo* which furnished the ground of an action of debt and the detriment to the promisee on which was based the

¹*Elements, of Law*, 5th ed.,
p. 312.

²*Contracts*, 7th ed., p. 104.

delictual action of assumpsit were both merged in the more general conception of Consideration as it was developed in Chancery." The Chancellor was accustomed to inquire into the intention of the parties beyond the form or even in the absence of the form by the rules of Common Law that the intention should be displayed and he would find evidence of the meaning of men in the practical results to them of their acts or promises.

Pollock's
View.

Pollock¹ says: "There may have been a greater complication of influences than we can now trace in detail. It is certain on any view that it was long before assumpsit got clear of its association with trespass and was understood to be in substance an action of contract." The action of assumpsit was trespass on the case, an action for damages, incurred by the plaintiff because defendant failed to carry out his duty, which he assumed. The action of deceit was founded on the actual damage which the plaintiff suffered owing to the fraud or deceit of the defendant. In this action of deceit we have detriment to the promises—loss of some legal advantage as opposed to disappointment of an expectation which is the most important element in the meaning of Consideration.

Ames' Stress
on
Detriment.

Ames has laid great stress upon this part of the history. He writes: "At the present day it is just and expedient to resolve every Consideration into a detriment to the promisee incurred at the request of the promisor. But this definition will not be true if we examine the cases of the 16th century. There were two separate forms of Consideration: (1) detriment, (2) precedent debt. Detriment was established in substance as early as 1504. There is no case before 1542 in which a promise to pay a precedent debt was discussed. These two species have different origins. The history of detriment is closely connected with the history of assumpsit. The origin of Consideration based on a precedent debt is to be found in *indebitatus assumpsit*."

¹Law of Contracts.

In Y.B. 43 Ed. III. 6 pl. 11 action was brought against a surgeon who undertook to cure the plaintiff but who unskilfully treated the patient and injured him. In Rashdell's Entries, (1596 fo. 3,) the defendant was summoned to answer "why when the said *A*, had undertaken (*super se assumpsisset*) to shave the beard of *B* well and skilfully with a clean and wholesome razor, the said *A* shaved the said *B* so negligently and unskilfully that the face of *B* became diseased." In these cases the plaintiff seeks to recover damages for injury done to his person or property caused by the misconduct of the defendant. In the pleadings it was stated in every case that the defendant undertook to do a certain thing but it was quite unnecessary in the count because actions sounded in tort. Consideration was never required in the law of tort. In *Powtuary v. Walton*¹ action was against a farrier who undertook to cure the plaintiff's horse and owing to negligent treatment the horse died. In the action it was stated 'action on the case lies on this matter without alleging any Consideration, for negligence is the cause of the action and not the assumpsit.' The gist of the action is tort and not contract. It is the peculiarity of early law that it does not recognise any *general* duty of taking care or any general liability for negligence. To render a man liable for *quasi* trespass of negligence, it was necessary to show the existence in the particular case of a special duty of diligence. Such a duty may arise by law or contract. Holdsworth² says: "The law annexed a new liability in tort to certain states of facts on grounds of public policy, and the law allowed a liability in tort to arise when a person had caused by the manner in which he fulfilled a duty which he had undertaken (*assumpsit*) to perform. In the first case the plaintiff brought trespass or deceit on the case" Salmond³ says: "Trespass on the case was applicable to the case of damage to the person or

¹1598 1 Holl Ab. 10 pl. 5.

³*Essays*, p. 206.

²*Hist. of Eng Law.*, Vol III.

property of the plaintiff. But deceit on the case included cases in which the plaintiff had suffered injury by acting on the reliance of the promise of the defendant." Mediaeval Society was represented as consisting of different classes of men obeying particular laws applicable to their class. The King, the peer, the knight, the yeoman, the villein, the merchant, the labourer, the artisan, etc., says Holdsworth, occupied definite and legally fixed places in the hierarchy of society. There were peculiar rules binding on each class. In the mediaeval period there were differences in the structure of society. Persons, like Innkeepers, or Common keepers, or persons like Smiths or Surgeons, were regarded as bound by their calling to show a certain degree of diligence and skill. If they failed to show that degree of skill, they were liable to action of trespass for negligence. The ground of allowing an action in tort was public policy because the persons who professed a particular calling must show a proper amount of skill and care. Holmes¹ says: "If damage had been done by the act or omission of the defendant in the pursuit of some of the more common callings, such as that of farrier, it seems that the action could be maintained, without laying an assumpsit on the allegation that he was a common innkeeper²". Blackstone³ says: "Everyone who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him to perform it with integrity, diligence and skill. And if by his want of either of those qualities, any injury accrues to individuals, they have, therefore, their remedy in damages by a special action on the case. Such persons are said to be liable by the law and custom of England." The allegation did not so much imply the existence of a special principle as state a proposition of law in the form which was then usual. In 12 Coke, *Reports* p. 64, it is stated that 'the judges were sworn to execute justice according to the law and custom of England.'

¹ *Common Law*. p. 164.

³ *Com.* Vol. III. p. 163.

² Y.B. 11 Hen. IV. 45.

Salmond¹ criticises Ames's view because there is a very great difference between the idea of detriment to the promisee and the idea of Consideration. These two ideas cannot be identical, much less can one be said to be the logical development of the other. In an action of deceit there is detriment but we cannot call it Consideration. The Consideration of precedent debt and moral obligation cannot be explained by this theory. He tries to explain that Consideration in action of *indebitatus assumpsit* is identical with *quid pro quo* in debt. But a pre-existing debt cannot be *quid pro quo*. Also the theory fails to explain how *quid pro quo* entered into the action of *assumpsit*. Salmond's Criticism.

Jenks suggests that the doctrine of Consideration is a compound doctrine of which the positive side (recompense or benefit to the promisor) is a reflection from the original character of the older action of debt, while the negative side (detriment to the promisee) is merely a slight antedating of the damage which was necessary to support action of case². Jenks's Theory.

It is quite clear that any attempt to trace the doctrine of Consideration to a single source is to ignore the history of the time during which it has gradually developed. It was not introduced into English law like any Act of Parliament, on a particular day by any single individual. All these conceptions must be set aside. The doctrine is the result of growth and progress. It has grown with its growth and strengthened with its strength. It cannot be studied alone. We must, for a time, look at the state of law in its infancy. From a simple society, there has emerged the complexity of great commercial enterprise. The rude requirements of our ancestors have given place to the complex demands of a highly civilised society. This doctrine was formed by gradual process to suit the requirements of the people. Hence it is not right to expect one process, working in one direction only. Conclusion.

¹ *Essays*, pp. 223-224.

² *A Short History of English Law*, p. 140, 1912, also *History*

of the Doctrine of Consideration by Edward Jenks, Chapter III, published in 1890.

spirit of adventure, economic progress and the stern common sense of lawyers and judges have contributed largely to the unique position which the doctrine occupies in the legal systems of the world. It is a mistake to regard Consideration as a mere matter of proof, *e.g.* writing and witnesses, as in the continental legal system, because in English Law, however clear and positive the evidence given to show that the agreement was made, the Court will not enforce it, unless and until it is clearly shown that the detriment of some legal right was suffered by the promisee at the desire of the promisor. In this respect the English doctrine stands alone. We have seen that the view that it was imported from without, from the Roman *Causa*, cannot be accepted, because there is no real foundation for that view, except the use of the term *nuda pacta*. We have seen that during the time of Bracton, Roman terminology was frequently used, but the meaning was quite distinct. It is suggested that the doctrine of Consideration was derived from the loan-money of the Lombards who entered into commercial transactions very frequently. But this view is not free from difficulty.

The doctrine as it is found to-day is to be traced to the middle of the 13th century, and the writ system was gradually so applied as to do substantial justice without impairing procedure. This point has been clearly brought out from the decided cases. In an archaic society the remedy is everything and the right nothing. The interest of the lawyer is to find out the right remedy. The maxim is not: where there is a right, there is a remedy, but where there is a remedy, there is a right. Hence it is correct to say that the doctrine began in procedural law. As the spirit of commerce and enterprise led to the conquest of new countries, it became necessary, to adapt the procedure to the requirements of the people. Gradually the doctrine became part of the substantive law of contract and property. This assimilation was brought about by the gradual process of development that went on during

the 14th and 15th centuries. Common Law was formed and the King's justice firmly established. Merchant from foreign lands came to England and wanted speedy remedy. The Law Merchant was made part of the Common Law about that period and contributed to the recognition of the principle that parties should not be forced to carry out their promisee unless the other party had suffered detriment by relying on the representation. Thus the doctrine satisfied the wants of the parties and at the same time prevented them from entering into binding engagements without mature thought.

CHAPTER III.

THE PRESENT ENGLISH DOCTRINE OF CONSIDERATION.

Meaning and
Definition
of the word
Considera-
tion.

Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however, small the benefit or inconvenience may be, is a sufficient Consideration if such act is performed or such inconvenience suffered by the plaintiff with the consent, either express or implied, of the defendant or in the language of pleading "at the special instance and request of the defendant¹".

Consideration is a cause or occasion meritorious requiring a mutual recompense in deed or in law².

A valuable Consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other³.

Consideration is the price, motive or matter of inducement of a contract which must be lawful in itself⁴.

The Consideration in a contract, conveyance or other legal transaction is an act or promise by which some right, interest or benefit accrues to one party or by which

¹ Selwyn, *Nisi Prius*, 8th ed., 1831, p. 47.

² 5 Viner's *Abridgement*, p. 405.

³ *A digest of the Laws of*

England, by Comyns, Vol. 1, 5th ed., 1822. "Action on the case Assumpsit," B 1-15.

⁴ *Warton's Law Lexicon*.

some forbearance, detriment, loss or responsibility is given, suffered or undertaken by the one and in return for which the party who receives the benefit or for whom the detriment is suffered, promises or conveys something to the other¹.

Consideration is the material cause, *quid pro quo* of any contract without which it will not be effectual or binding².

Consideration is that which the Greeks called the material cause of a contract, without which it would not be effectual or binding³.

Any act by which the person making the promise has benefit or the person to whom it is made has any labour or detriment is a sufficient Consideration⁴.

Consider, Latin *considerare*, look at closely, observe, meditate. Originally, it is supposed, an augurial term, observe the stars. *Cona Sidus* (*sider*), a star, a constellation. In Law Consideration means that which a contracting party accepts as an equivalent for a service rendered; the sum or thing given or service rendered in exchange for something else, or the sum, thing or service received in exchange for something the price of a promise or a transfer of property. This may consist either in a benefit to the promisor or a burden assumed by the promisee or both⁵.

Consideration is regarded as recompense or equivalent for what one does or undertakes for another's benefit; in the Law of Contract it means the thing given or done by the promisee in exchange for the promise. That thing may itself be a promise⁶.

At first the word Consideration had not acquired any technical meaning and was used as an equivalent for motive. Gradually it began to be used in a peculiar

¹Sweet's *Law Dictionary*.

Obligations or Contracts, by

²Tombin's *Law Dictionary*,
Granger, 4th ed.

M Pothier, tr. by W. D.
Evans, 1806, Vol. II., p. 22.

³Cowell's *Law Dictionary*,
ed. 1727.

⁵*The Century Dictionary*.

⁴*Treat is on the Law of*

⁶Langdell, *Summary of the*
Law of Contracts, s. 45.

sense. It assumed its technical meaning in the 17th century. Natural affection was formerly called good Consideration, as distinguished from valuable Consideration or that which has got any pecuniary value. In *Doctor and Student*¹ St. Germain says : " If the promise be so naked that there is no manner of Consideration why it should be made, then I think him not bound to perform it. In 1641² Consideration is treated as a material cause of a contract without which no contract can bind the party.

By Consideration is meant some compensation or *quid pro quo* to be afforded by the promisee in return for certain services rendered³.

A valuable Consideration is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made⁴.

Any damage or any suspension or forbearance of a right or any possibility of a loss occasioned to the plaintiff by the promise of another is a sufficient Consideration for such promise⁵ although no actual benefit accrues to the party undertaking⁶.

Consideration may be *described generally* as some matter accepted or agreed upon as a return or equivalent for the promise made. The fact of bargaining for and giving an equivalent for the promise serves to show that the parties act with deliberation⁷.

A person who makes a promise to do or not to do something must derive some gain in return for his promise arising from an act or forbearance of the other party (the promisee) and this gain is called Consideration⁸.

¹*Dial*, II, ch. 24.

²*Termes de la Ley*, 677.

³Blackstone, *Commentaries*, Vol. II, 59, 13th ed.

⁴Kent's *Commentaries*, 1826, Vol. II, ch. 39, p. 465.

⁵*Forth v. Stanton* 1670, I Wm. Saunders 21 Id.

⁶Chitty on *Contracts* (1912) 16th ed., p. 25.

⁷Leake, *Principles of Law of Contracts*, 6th ed. 1911, pp. 5, 439.

⁸Erwin Grueber in *Quarterly Law Review* II., p. 33.

Valuable Consideration has been defined as some right, interest, profit or benefit according to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other at his request¹.

Consideration is an act or forbearance called for and induced by the promise².

A valuable Consideration may consist in the giving of property or in the giving or surrender of something which is not property measured by any pecuniary equivalent³.

Consideration is something done, forborne or suffered by the promisee in *respect of the promise*⁴.

Consideration is an act or forbearance of one party or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable⁵.

The Consideration is the thing given or done by the promisee in exchange for the promise⁶.

Consideration connotes two ideas : (a) the promisee has either conferred a benefit on the promisor or (b) incurred a detriment as an inducement to the promise⁷.

Consideration in its widest sense is the reason, motive or inducement by which a man is moved to bind himself by an agreement⁸.

Consideration is defined as something given by the promisee in exchange for the promise resulting in legal detriment⁹.

¹Halsbury's *Laws of England*. 7 Vol., p. 383.

²Harriman on *Contracts*.

³In *Re Pope* (1908) 2 K. B. 175 C. A. Per Buckley L. J.

⁴Anson on *Contracts*, 1912 13th ed., p. 93.

⁵Pollock, *Contracts*, 8th ed., p. 175.

⁶Langdell, s. 45.

⁷Holmes, *Common Law*.

⁸Salmond's *Jurisprudence*, p. 319.

⁹Prof. Williston, 8 *Harv. L. R.* 33, p. 36.

Consideration is defined as any act or forbearance or promise by one person given in exchange for the promise of another provided it is not contrary to public policy¹.

A party to a contract is said to receive Consideration for his promise when the promisee does, forbears or suffers or promises to do, forbear or suffer something in exchange for, and at the time of, the promise made to him².

Money, marriage, doing something which is troublesome to oneself or of use to the other party to the contract are all valuable Considerations³.

A conveyance or promise is said to be made for valuable Consideration when something is exacted in return for it; not necessarily the payment of money but anything which is a burden on the party accepting the conveyance or promise and on which the other sets a value⁴.

A contract is made upon Consideration when something is done, forborne, suffered or undertaken by one party at the request of another, which is made the foundation of the promise of that other⁵.

When at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called a Consideration for the promise⁶.

Consideration has been defined as some right, interest or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other⁷.

¹Ames, "Two Theories of Consideration" 12 *Harv. L. R.* p. 576.

²*Digest of English Civil Law*, Book II, Part I.

³Elphinstone *Introduction to Conveyancing*, p. 72.

⁴Williams, *Real Property*,

20th ed., p. 78.

⁵Markby, *Elements of Law.*, p. 308.

⁶*Indian Contract Act* IX of 1872 S. 2 (d)

⁷*Currie v. Misa* L. R. 10 Ex. 162.

The above statements are defective because instead of laying down a principle, they try to give instances. A definition in order to be exhaustive must set out clearly the marks whereby the thing to be defined can be distinct from all other things. All that is required is to indicate the constituent elements of Consideration. The definition must include the following marks : (a) an act or forbearance or promise to act or to forbear ; (b) that act, forbearance or promise must be made in exchange for the act, forbearance or promise of the other party, (c) the act, forbearance or promise must have some value in the eye of the law; and (d) be allowed by the law of the land. There must be a detriment of some legal right by the promisee at the desire of the promisor by relying on the promise. The analysis of Consideration must show that one party made the representation to another party with the intention that the other person should act in a certain manner on the faith of such representation, and that person should have acted on it in the way intended and have suffered a detriment thereby.

Civilians divide Consideration into—

(a) *Do ut des*, as where I give *money* to you, in order that you should give *money* to me.

Classifica-
tion of Con-
sideration.

(b) *Facio ut facias*, as where I do *work* for you in order that you should do work for me.

(c) *Facio ut des*, as where I do work for you in order that you should give money to me.

(d) *Do ut facias*, as where I give money to you in order that you may do work for me.

Consideration is divided by text-writers into executory and executed, concurrent and continuing¹. This division is intended to show the relation which its performance bears in point of time to the promise. An executed Consideration is some act performed or some value given at the time of making the promise and in return

Executed
and Execu-
tory Consi-
deration.

¹ *Roll Abr. Q. Pl. 213 Chitty on Contracts, p. 35.*

for the promise then made. Executed Consideration is opposed to executory; and means present as opposed to future, an act as opposed to a promise¹. A Consideration which is itself a *promise* is said to be executory. A Consideration which consists in performance is said to be executory². When Consideration consists in something done, forborne or suffered, it is said to be executed; when Consideration consists in a promise to do, forbear or suffer, it is said to be executory. An executory Consideration becomes executed upon performance³.

Concurrent
and conti-
nuing.

Consideration may be concurrent or continuing. It is said to be concurrent when it is contemporaneous with the promise; it is said to be continuing when it exists before the promise and also continues after the promise is made⁴. Under the head of concurrent Consideration can be included mutual promises, *e.g.* A makes a promise to B in Consideration of a contemporaneous promise made by him to A. Under the head of continuing Consideration are included all legal liabilities, as where in consideration of a sum of money being legally due, the debtor promises to pay⁵.

Good and
valuable.

Consideration may be good or valuable, *i.e.*, based on family affection as opposed to money value. The existence of a blood or marriage relationship between the parties is often described as good Consideration. It is largely used in the Law of Property. A covenant to stand seised to uses is a conveyance operating without any transfer of possession, by which a man seised of lands covenants in Consideration of blood or marriage that he will stand seised of the same to the use of his child, wife or kinsmen for life, in tail or in fee. The statute executes the estate for the party who is intended to benefit and who is put immediately in corporal possession of the

¹Leake, *Contracts* 6th ed., p. 6.

²Lampleigh v. Braithwaite, I. S. L. Ca. 115; Pollock, *Contracts*, p. 176.

³*Digest of English Civil Laws*, Book II, part 1.

⁴Bacon, *Abridgement*, "Assumpsit," D.

⁵Note to Wennall v. Adney 3 Bos. and Pul 247, in Finch's *Select Cases*, pp. 358-61, 2nd ed. 1896.

land without seeing it by kind of parliamentary magic¹. The Consideration of this conveyance is the basis of it and the words 'covenant to stand seised' are not absolutely necessary, but any other words such as grants, bargain and sale or assign will create a covenant to stand seised, if it appears to have been the intention of the party to require them for that object. A covenant to stand seised is a private conveyance and valid without inrolment, hence it is quite necessary that Consideration be either affection to a near relative or marriage. The Consideration of friendship, long acquaintance, of being school-fellows, of affection to a natural son, or of the king as being head of the Commonwealth, will not raise use by way of covenant to stand seised because no use can arise in favour of strangers.

By Consideration of blood or natural affection it was meant that if the donor felt natural affection toward a near relative, it would be sufficient to vest in a son, brother, nephew or cousin the beneficial interest, if the donor expressed the intention in a deed².

A bastard may be a reputed son, yet he is not a son in Consideration whereof a use can be raised because as Littleton says, in Law he is *nullius filius*. In Worsey's case³ though a bastard is not a son for whom the Consideration of blood will raise a use, yet on an estate otherwise effectually passed, a use may be declared to him if he be sufficiently described. In the one case the estate passes without the aid of a Court of Equity, from the grantor to the grantee, owing to trust or use being raised in his favour. But in the other case the transaction rests in a covenant between the covenantor and cestique use, and if the covenant was owing to the absence of the Consideration of blood or valuable Consideration. But on bargains and sales of land in which the essential Consideration to raise a use is money or price uses may be declared without any Consideration. Permission given

¹ 2 Blackstone, *Commentaries* 338, and Coke, 2 *Inst.* 672.

² Gilbert on *Uses*, p. 93.

³ 23 Elis. in Dyer per Lord Coke.

to enter a school and take photographs, on the chance of selling copies to the proprietors, was a 'good Consideration' and the photographer must be deemed to have made or executed on behalf of the proprietors of the school for a good or a valuable Consideration within the meaning of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68 s. 1) and the copyright belonged to the proprietors of the school and not to the photographer. Farwell J. says¹: "The Act of Parliament expressly distinguishes between a good and a valuable Consideration.....in my opinion there is a perfectly 'good Consideration' given by the owners of the establishment to the photographers by allowing them to come on to the premises and take the photographs". Anson² says: "It may be questioned whether good Consideration, apart from blood relationship, is ultimately distinguishable from valuable Consideration."

Consideration may be moral. Generally moral Consideration is binding on the conscience of the promisor but is not legally binding on him³. A promise made in Consideration of past immoral conduct is not regarded as made on an illegal Consideration, but is a gratuitous promise, binding if made under seal, but void if made orally. Considerations may be illegal, where they are contrary to the general policy of law, *e.g.*, contracts in general restraint of trade⁴.

At Common Law contracts in restraint of trade, though under seal, must be reasonable; test of the transaction being reasonable is the existence of valuable Consideration; or contracts may be tainted with champerty.

In *Hermann v. Jeuchner* (1885, 15 Q.B.D. 561 (C.A.)) a man requested another to go bail for him and the amount of the bail was deposited in the hands of the surety as an indemnity. The surety was sued for the money deposited and pleaded the illegality of his contract, and further

¹*Stackemann v. Paton*. 1906, ch. I 774, 779, 780.

²*On Contract*, 12th ed., 1910, p. 95.

³*Beaumont v. Reeve* (1846) 8 Q. B. 483.

⁴*Mallan v. May* (1843) 11 N. & W. 665.

stated that the illegal purpose had not been accomplished and demanded the money. The Court decided that the object was carried out because the surety had no interest in seeing that the terms of the bond were observed. Contracts which interfere with the course of justice or promises founded on immoral Consideration are void¹.

Consideration may be *fraudulent*. Conveyances may be affected by the statutes 13 Eliz. c. 5 and 27 Elis. c. 4. (a) ^{Fraudulent Consideration.} when they are made with the intention to defraud creditors or subsequent purchasers, or (b) without any valuable Consideration, or (c) made for good but not for valuable Consideration, such as deeds made to provide for a man's family. A promise which is merely fraudulent is voidable although the word used in the Acts is void. A statute declares betting contracts to be void though, *e.g.* Statute 7 Geo. III, c.8, relates to stock-jobbing contracts.

Consideration may be *usurious*. Statute 27 Eliz. c. 4, ^{Usurious Consideration.} was passed to protect purchasers buying real estate and 13 Elis. c. 5, was passed to protect creditors relating to personal estate. The object of these statutes is to avoid voluntary conveyance, as against creditors and subsequent purchasers: but the party making the same and the persons claiming under him are bound by the transaction.

Consideration may be nominal. There may be an intention on the part of the parties to treat a particular act or detriment, however insignificant, as valuable ^{Nominal Consideration.} Consideration. It is good enough, if it is so treated by the parties. It is for the parties to determine its adequacy².

Consideration may be incompetent. It consists in doing some act which the actor is under a legal obligation to do. The doing of such an act is not a good or valuable ^{Incompetent Consideration.} Consideration because there is no detriment to the man who does it, *e.g.* quitting vicious habit is not an incompetent Consideration because law does not recognise such legal duty.

¹The Law of Maintenance is discussed in *Oram v. Hunt Por Swifon Eady J.* ^{*The Times*} ²Thomas 2 Q. B. 851.

A.—RULES OF THE ENGLISH DOCTRINE IN THE LAW OF CONTRACT.

RULE 1.—A Simple contract cannot be binding upon a party to it unless valuable Consideration passes for his promise.

In *Rann v. Hughes*¹ the Lord Chancellor asked the judges' opinion on the question "whether sufficient matter appear upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity." Lord Chief Baron Skynner said: "It is true that every man is by the Law of Nature bound to fulfil his engagements. It is also true that the Law of England supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient Consideration. Such agreement is *nudum pactum ex non oritur actio*; and whatever may be the sense of this maxim in the Civil Law, it is in the last mentioned sense only that it is understood in our law. The declaration states that the defendant was indebted as administratrix and promised to pay when requested and the judgment is given against the defendant. The being indebted is of itself a sufficient Consideration to ground a promise, but the promise must be coextensive with the Consideration unless some particular Consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity." "All contracts are by the Law of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain as contracts in writing. If they be merely written and not specialities, they are parol and a Consideration must be proved. *Pillans v. Van Mierop*² and the case of *Losh v. Milhamson*³ and so far as these cases went on the doctrine of *nudum pactum*, they were erroneous⁴."

¹ 1778 House of Lords, 7 *Term Reports*, p. 350, note A.

² In (1765) 3 Burr. 1663.

³ Mich 16 G. 3 in B. R.

⁴ Finch, *Cases on Contracts*, pp. 273-274.

Lord Mansfield said¹: "If there is no fraud, it is a mere question of Law. The Law of Merchants and the Law of the Land are the same. A *nudum pactum* does not exist in the usage and Law of Merchant. I take it that the ancient notion about the want of Consideration was for the sake of evidence only; for when it was reduced into *writing* as in covenants, specialties, bonds, there was no objection to the want of Consideration. And the Statute of Frauds proceeded upon the same principle. In commercial cases amongst merchants, the want of Consideration is not an objection." The principle of an agreement was looked upon as a *nudum pactum* and was an echo from the maxim '*ex nudo pacto non oritur*' of Roman Law. Vinius also gives the reason for the view². If by writing, it was good without Consideration, there was no defect in the contract for want of Consideration. But it was required to put people upon "attention and reflection" and to prevent "obscurity and uncertainty." And in that view writings or certain formalities were required. Consideration was intended as a guard against rash, inconsiderate declarations; but if an undertaking were entered upon with deliberation and reflection, it had activity and such promises were binding. Grotius and Puffendorf held them obligatory by the law of nations³. Bracton is the first of English lawyers who mentions this. Plowden⁴ distinguishes between oral and written agreements because the former are rash while the latter are serious. His words are the marrow of what the Roman lawyers had said: "Words pass lightly, but where the agreement is made by deed, there is more stay." Delivery of the deed signifies good-will that the thing in the deed shall pass from him who made the deed to the other. The voidness of the Consideration is the same in both cases. The reason of adopting the rule was the same in both cases; "There is

¹In *Pillans and Rose v. Van Maierop and Hopkins*, K. B. 765, 3 Burr. 1667.

²In *Lib. 3 tit. De Obligationibus*, 4th ed. p. 596.

³Grotius, *Lib. 2 c. 11 De Promissis*. Puffendorf *Lib. 3 c. 5*.

⁴*Sherrington and Pledal v. Strotton*, Plowden p. 308.

a difference in the ceremonies required by each law, but no inefficacy arises merely from the naked promise¹."

There are exceptions to the general rule that Consideration is essential to the validity of every simple contract. This was rendered necessary to preserve the validity of those specified contracts created by Law Merchant which are known as negotiable instruments. These are exceptions to the general rule on account of the peculiarity of the *Lex Mercatoria*.

Peculiarity
of the *Lex*
Mercatoria.

Exceptions arising owing to the peculiarity of *Lex Mercatoria*.

The *Lex Mercatoria* is a body of customs which are constantly observed by merchants in their commercial dealings with one another; the doctrine of Consideration was absent in that law. When the Mercantile Law was completely incorporated with Common Law during Lord Mansfield's tenure of office some doubt arose as to the effect of the inclusion upon the Common Law. Lord Mansfield² then laid down the dictum 'in commercial cases amongst merchants the want of Consideration is not an objection.'

The plaintiffs were a firm of merchants outside London; the defendants were a firm of merchants in London. W, a merchant in Ireland, wrote to the plaintiffs asking if they would accept a bill of exchange for a sum of £100 which he desired to draw upon them payable to C. The plaintiffs agreed if W would give credit on a building situated in London. W named Van Mierop and Hopkins as surities. The plaintiffs accepted and paid the bill drawn upon them, and Van Mierop and Hopkins agreed also. W, the merchant in Ireland, became insolvent. Van Mierop and Hopkins informed Pillans and Rose of this fact of insolvency, and withdrew their consent to accept the bills drawn upon them by Pillans and Rose;

¹Finch, *Cases on Contracts*, pp. 263-272. Mierop and Hopkins, K. B. (1765) 3 Burr. 1663.

²Pillans and Rose v. Van

Pillans and Rose in spite of the fact of insolvency of *W* drew the bills on Van Mierop and Hopkins. Mierop and Hopkins refused to pay and Pillans and Rose sued them. The Court decided in favour of Van Mierop and Hopkins. A new trial was granted because (a) the undertaking of Van Mierop and Hopkins to accept the bills must have rendered loss possible to Pillans and Rose who would have been prevented from obtaining further security from *W*, and (b) it being a mercantile dealing, it was binding by the Law Merchant without any Consideration being required. Lord Mansfield held that “A *nudum pactum* does not exist in the usage and Law of Merchants. I take it that the ancient notion about the want of Consideration was for the sake of evidence only ; for when it is reduced to writing, as in covenants, specialities, bonds, etc., there was no objection to the want of Consideration. In Commercial cases amongst merchants the want of Consideration is not an objection.” The House of Lords overruled the *dictum* of Lord Mansfield. Isabella Hughes was administratrix of *J. H.* who owed some money to *Rann* as an executor of *M. H.* Isabella Hughes promised to pay the debt to *R* who sued her on the promise. The Court held that Isabella Hughes was liable. The Court of Exchequer Chamber reversed this judgment. Lord Chief Baron Skynner decided that Isabella Hughes was not personally liable for that promise and his reply to the argument that ‘if this promise is in writing, it takes away the necessity of Consideration’ was that there cannot be *nudum pactum* in writing ; whatever may be the rule in Civil Law there is certainly none such in the law of England. The *dictum* of Lord Mansfield in *Pillans v. Van Mierop* was thus overruled¹. In the Statute of Frauds, contracts to be reduced to writing never dispensed with the necessity of Consideration. The House of Lords affirmed the judgment of Court of Exchequer Chamber. All simple contracts, whether mercantile or not, must have Consideration to make them binding. Consideration is

¹*Rann v. Hughes*, 1778 H. L. 7 Term Report 350.

the basis of all contractual rights and it was so applied as to observe those contractual rights which were intended to confer rights on third persons by *Lex Mercatoria*. The rules are :—(a) the holder of a negotiable instrument is deemed to be a holder for value if either he or any one through whom he acquired it, gave a valuable Consideration. ; (b) the holder of such an instrument is presumed to be a holder for value unless the person liable to pay can prove the contrary; but if it can be proved that the instrument was obtained for an illegal Consideration or by means of fraud or some improper dealing, the holder cannot enforce payment, unless he satisfies the Court that he or some one through whom he obtained it gave valuable Consideration without any knowledge of the taint of illegality. The rule that Consideration¹ must move from the promisee does not apply to negotiable instruments.

Presumption
in Favour of
Considera-
tion.

The holder is presumed to be a holder for value unless the defendant can prove the contrary. In negotiable instruments presumption arises that Consideration has passed unless the person who has to make payment shows to the contrary; if he proves that the instrument was given for an illegal Consideration such as fraud or some dishonest dealing, the assignee cannot recover the money until he proves that he paid the value for it and acted *bona fide*. In England since 1840 the actual recital of value received is unnecessary as the law will raise the presumption of Consideration².

Rules as to
Considera-
tion and
Bona fides.

(a) English law does not require that any Consideration should pass between the original parties to the contract or between the intermediate transferor and transferee if the holder for the time being or the person from whom he derived the title gave value or Consideration, *e.g.* If X desiring to make a present of £15 makes a promissory note for that amount payable to Y or order and sends it to Y to buy a watch of Z and Y specially endorses the note to Z in payment; Z endorses that note in blank

¹ 45 and 46 Vict. C. 61, Bills of Exchange Act 1882, s. 27.

² Malyne's *Lex Mercatoria* 74.

and sends it as a wedding present to *A* who gave no Consideration. *A* can enforce the payment from *X* who received no Consideration. If an action is brought by or against the holder of negotiable instruments the presumption is in favour of the holder that the original promisee and every successive transferee had given valuable Consideration till it is shown : (1) that valuable Consideration was not given ; or (2) that original Consideration or Consideration for any transfer was illegal or that there was fraud or improper dealing in the original contract resulting in prejudice. The judgment will be given against the holder unless he can show that : (*a*) he is a holder for value and (*b*) he has acted *bona fide*. Cotton L. J. said : “ Where a just and *bona fide* debt actually exists, there is a good Consideration for giving a security¹”. If it is proved that there was illegality, the holder of the negotiable instrument must prove that he gave value and acted *bona fide*. This can be established in two ways : (1) If he or some person through whom he acquired title gave valuable Consideration ; or (2) if at the time of acquiring that instrument he or the person through whom he acquired the title for value had no knowledge of illegality or fraud or circumstances from which a reasonable man might be expected to make better and further inquiries before taking the instrument. “ The man who seeks to recover upon the bill must establish to the satisfaction of the court or jury not only that he is a holder for value but that he is an honest holder for value²”. Even if the holder is ignorant of illegality owing to his negligence he is a *bona fide* holder if his ignorance is honest³.

Lord Herschell⁴ held that the question of *bona fide* is always one of facts ; if a person takes a negotiable instrument for value, honestly believing that the person

¹Fowler v. Sadler 1882, 10 Q. B. D. 572. pp. 91, 92. • •

²Willis on *Negotiable Securities*, 2nd ed., p. 143; Chalmers's *Digest of Bills and Notes and Cheques*, 9th ed.,

³Raphael v Bank of England, 1855, 25 L. J. C. P. 33.

⁴London Joint Stock Bank v. Simons, 1892. A. C. 201.

from whom he takes it has a right to dispose of it he will acquire a good title ; the knowledge that the person dealing with the negotiable instrument is only an agent does not compel the person taking it to inquire into the nature of his title or the extent of his authority, but if there be anything to excite the suspicion that there is something wrong in the transaction, the taker of the instrument cannot be acting in good faith if he shuts his eyes to such facts and does not make further inquiry, or if further inquiry does not remove that suspicion. In *Sheffield v. London Joint Stock Bank* (133 App.Ca. 333) the defendant knew or suspected that the person from whom he took was exceeding his authority. Lord Herschell pp. 218-19 said : "The only two conditions to be well established as essential to confer a good title upon the holder of a negotiable instrument are : (1) that he should have taken it *bona fide* and for value, and (2) that due care and caution should have been exercised by the taker of the securities."

The Lord
Mayor's
Court.

How far must Consideration and promise arise within the City of London in order to give civil jurisdiction to the Lord Mayor's Court in London ?

When only local courts existed in England the question as to jurisdiction or locality of any contract could not arise¹. Under the count *concessit solvere* formerly no jurisdiction was averred. In Turbill's case, 1 Wm. Saunders 68, 2, it is stated that neither did early records aver that any matter arose within the jurisdiction. In *Mayor of London v. Cox* (H. L. 36 L. J. Reports, Exch. 225) it was decided that the Court of the Mayor of London was an inferior Court.

The Court of the Mayor of London has jurisdiction in cases upon contracts made *within* the City although the work contracted for is performed out ; the goods delivered in the City, the order having been given out of the city ; or order for goods received in the city and goods sent out of the city². Also a promise

¹ Brandon, *Notes on Practice in Mayor's Court*, 1871.

² *Huxham v. Smith* 2 Camp. 197

within the city to pay an account arising out of the city, the amount being mentioned, or a promise to pay the account, the promise having reference to a special account containing the amount¹. Since the passing of the Mayor's Court Procedure Act in 1857 this question of jurisdiction has been changed. Prior to the Act if a plaintiff averred jurisdiction and the defendant was never indebted, he was bound to prove some jurisdiction. The Mayor's Court Procedure Act (of 1857 s.15) enacts that unless the defendant plead to jurisdiction he cannot object afterwards to want of jurisdiction and if the defendant plead to jurisdiction, he must plead to the whole of the cause of the action and "that the supposed causes of action and each and every of them arose out of the jurisdiction," so that at all events if jurisdiction must still be shown, if any part of the cause of action arises within the city, the plea must fail. In cases where damage claimed in any action does not exceed the sum of £50, no plea to the jurisdiction is allowed if the defendants or one of them dwell or carry on business within the city or liberties at the time of the action, or shall have so dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein².

Formerly it was held in the Mayor's Court that wherever a declaration could be framed in Superior Courts in which the plaintiff could recover for a cause *ex contractu*, the Count of *Sur concessit solvere* would lie³, but now this practice has been changed and it is usual to consider it as a general *indebitatus assumpsit* count embracing all debts and demands of liquidated nature including bills of exchange and promissory notes, whatever may be the position of parties to the instrument⁴.

¹Emery v. Bartel 2Ld. Cases in Mayor's Court.
Reym 1555.

²Mayor's Court Procedure Act, 1857, s. 12.

³Vaillant, *Miscellaneous* on Mayor's Court.

⁴For form of Count Concessit Solvere and other forms, see Form No. VIII, Brandon,

RULE II.—Valuable Consideration consists in some Legal Detriment to the promisee by relying on the promise of the other contracting party. It is quite immaterial that promisor should derive any advantage from the promise.

Forbearance is no Consideration where no person is liable. Lord Ellenborough C. J. said: "It is a known rule of law that to make a promise obligatory, there must be some benefit to the party making it or some detriment to the party to whom it is made; otherwise it is considered as *nudum pactum* and cannot be enforced¹". Case of an offer by Advertiser:—Hawkins J. said: "The substance of the offer is to pay the named sum as compensation for the failure of the article to produce the guaranteed effect of two weeks' daily use as directed. Such legal use was sufficient legal Consideration to support the promise². In *Fleming v. Bank of New Zealand*³ Lord Lindley delivered a judgment to similar effect and approved *Currie v. Misa*⁴ as authorities for the view. Thompson had deposited the sheep warrant with the bank and in consequence the bank got some right, interest, profit or benefit, which is all that is required by the first half of the definition to constitute a Consideration, for the Bank's promise to Thompson as agent for the plaintiff to pay the cheques which he had drawn and were outstanding⁵; the matter of the Consideration must be given, done or suffered by the promisee himself or if by a third party at the request and by the procurement of the promisee and as the agreed equivalent for the promise.

*Talbot v. Stemmons*⁶: A promise to pay a regular amount of money to a woman if she would lead a sober

¹ Finch, *Cases on Contracts*, Jones v. Ashburnham 1804 K. B. 4 East. 455, pp. 283—290.

² Carlill v. Carbolic Smoke Ball Co., 1892, 2 Q. B. D. 489, 1893 C. A. 256.

³ 900 A. C. 577.

⁴ Comyn, *Digest*, "Action on the case Assumpsit", B 1-15.

⁵ Leake, *Contracts*, pp. 439-440, 11th Ed.

⁶ (1889) 89. Ky. 222a.

and virtuous life was held binding by the Supreme Court Victoria¹. These cases put a new aspect on cases like *Beaumont v. Reeve* (1846. 8 Q. D. 483) where the plaintiff sued on a promise by defendant to pay an annuity. The court held that the moral obligation resting on the promisor to provide for the plaintiff was a mere gratuitous promise ; it would be binding if made under seal, if it was made by parol it would be void. Consideration consists not in the moral obligation of the promisor but in the detriment which the promisee incurs in shaping her conduct according to the terms of the promise.

Consideration for warranty of authority consists in one person making to another a statement of having authority to act as an agent for a third party and inducing that other to act on that statement relying that the authority existed ; the acceptance of the offer is turned into a promise and is at the same time a consideration for the promise. This contract is called a warranty of authority. If it turns out that the party had not the authority which he professed to have, there is a breach of contract and he can be sued. In *Collen v. Wright*² Willes J. said: " A person who induces another to contract with him as an agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts, for any damages he may sustain by reason of the assertion of authority being untrue. It is not the case of a bare misstatement by a person not bound by any duty to give information. The obligation arising in such a case is expressed by saying that a person by professing to contract as agent for another impliedly, if not expressly, undertakes or promises the person who enters into such contract, upon the faith of the agent being duly authorised, that the authority does in fact exist. The fact of entering into the transaction with the professed agent as such is a good Consideration for the promise."

¹ 1892, 18 Vict. L. R. 114.

² 1857, 7 E. and B. 301 ; 8 E. and B. 647.

Lord Campbell said: "There can be no doubt that the testator asserted that he had authority to let the property on the terms to which he agreed. That is a promise and a warranty. Might he not then have been sued on the warranty although he believed it to be true? If he induced the plaintiff to act upon it, he was bound. It is broken since the testator had not the authority". Wightman J. said: "If a man makes a contract as agent, he does promise that he is what he represents himself to be and he must answer for any damage which directly results from confidence being given to his representation." Crompton J. expressed himself of the same opinion. In *Firbank's Executors v. Humphreys*¹ Lord Esher M. R. said: "When a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into, but for that assertion, and that assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it, understood that it was true and he is liable personally for the damage that has been incurred. That being the rule, I am of opinion that all those defendants by issuing this debenture-stock asserted to Firbank that they had authority to bind the company by that issue." In *Starkey v. Bank of England*² the Earl of Halsbury L. C. said: "I do not go into the principles upon which the law laid down in *Collen v. Wright* may be supposed to rest. It is enough for me to say that at any rate, upon the grounds there stated, it has been the law for fifty years, enunciated by judges of the highest authority. I have not the least notion how that state of law is supposed to have been shaken in *Derry v. Peek*³. We have more than once been informed that *Derry v. Peek* is supposed to have altered the law. I do not think *Derry v. Peek* has anything to do with it. *Derry v. Peek* was an action for deceit you must prove deceit and you must prove malafides on the part of the person who deceived the

¹(1866) 18 Q. B. D. (C. A.)
62.

²1903 A. C. 114.

³14 A. cases 337.

other. But what that has to do with the present case? Here is a formal document intended to be acted upon, which upon the face of it purports to be a representation of authority by the persons whose signatures purport to be appended thereto. Upon the facts, I should have thought it was impossible to doubt that, that was a representation of authority on the part of those two persons whose signatures purport to be to it and the person who presents the authority and demands to act upon it himself asserting that he has authority to do the thing he is doing. He has no such authority. The result is that the Bank has transferred a quantity of Consols standing in the name of two persons when only one gave the authority. This appears to me to come within the decision to which I have referred and I do not think it is necessary to go through the catena of cases on the subject. It is said that this case is extending the principle of *Collen v. Wright*. I do not think it is. I do not understand what is meant by saying that there is a distinction which makes it an extension of *Collen v. Wright*. The consequence in *Collen v. Wright* was a contract, but here no such consequence follows. I think it is absolutely immaterial. The case seems to me as a matter of principle to fall exactly within *Collen v. Wright*¹. The decision of Kekewich J. (1901, 1 ch. 652) and of the Court of Appeal reported in *Oliver v. Bank of England* (1902, 1 ch. 610) was affirmed.

RULE III.—Valuable Consideration must be an act, forbearance or promise of the promisee given as an equivalent for the promise of the other party.

Where there was no request in fact nor any actual agreement respecting the payment but the circumstances alone raised a debt, the Law implies a fictitious request to pay it, by means of which the plaintiff was enabled in pleading under the old system to state his claim in a compendious form of "money had by the plaintiff for the defendant at his request," instead of stating in detail

¹ 7 E. and B. 301.

the circumstances of the payment¹. Patterson J. said: "It would be giving to *causa* too large a construction if we were to adopt the view urged by the defendant. It would be confounding Consideration with motive. Motive is not the same thing with Consideration. Consideration means something which is of some value in the eye of the law moving from the plaintiff; it may be some benefit to the plaintiff or some detriment to the defendant, but at all events, it must be moving from the plaintiff. Now that which is suggested as the Consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator and therefore, legally speaking, it forms no part of the Consideration². Consideration in all cases must move from the promisee. The meaning of this rule seems to be that the matter of the Consideration must be given, done or suffered by the promisee himself or if by a third party at the request and by the procurement of the promisee and as an agreed equivalent for the promise³.

Where Consideration moves from two persons, it is not necessary that both should be joined as plaintiffs in an action brought to enforce a promise made to one of them⁴. A person who is not a party to the Consideration cannot sue on the contract. But there are exceptions. The general rule is that a contract is binding on the parties only and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. Wightman J. said⁵: "It is now established that no stranger to the Consideration can take advantage of a contract, though made for his

¹Osborne v. Rogers, 1670, 201—386; Comyn's *Digest* 1 Wm. Saunders, 356. (1822), Vol. 1, 283-337.

²Finch's *Cases on Contracts*, pp. 277-82, Thomas v. Thomas, 2 Q. B. 851. ⁴Jones v. Robinson (1847) 1 Exch. 454.

³Leake, *Contracts* (439-440) and S. 398. ⁵Tweddle v. Atkinson 1 B.

Viner's *Abridgement* (1791),

benefit". *M* and *N* married, and after the marriage a contract was entered into between *A* and *X*, their respective fathers, that each should pay a sum of money to *M* and that *M* should have power to sue for such sums. After the death of *A* and *X*, *M* sued the executors of *X* for the money promised to him. Held no action would lie. Wightman J. said: "Some of the old decisions appear to support the proposition that a stranger to the Consideration of a contract may maintain an action upon it if he stands in such a near relationship to the party from whom the Consideration proceeds that he may be considered a party to the Consideration. The strongest of those cases is that cited in *Bourne v. Mason* (1660 1 Ventr. 6) in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the Consideration can take advantage of a contract although made for his benefit. The rule seems to import no more than is necessarily implied in the conception of a Consideration as an essential part of the agreement¹.

How far will love and affection be sufficient to support action on promise in favour of blood? Love and Kinship.

Love and affection had been considered sufficient to vest the use as early as 1504 when it was said that a grant to a brother was made on good Consideration, for the elder brother is bound by the Law of Nature to aid and comfort his younger brother as the father is bound to his sons. The principle that Consideration must be a detriment moving from the promisee is constantly applied in Common Law by holding that the right to maintain an action of assumpsit on the contract resides in the person from whom the Consideration moves. The recognition of this principle in a Court of Common Law carried with it the further consequence that no person

¹Leake, *Contracts* p. 431; Pollock, *Contracts* p. 223.

other than the one from whom Consideration moved could maintain any action at all. A person for whose benefit a contract is made, if he is a stranger to the Consideration, cannot maintain an action upon it. Langdell¹ says: "A binding promise vests in the promisee and in him alone, and has a right to compel performance upon the promise. If a promise is made to one person for the benefit of another, it is quite clear that the promisee can maintain action not only in his own name but for his own benefit. If the person for whose benefit the promise was made could also sue, the promisor would be liable to be sued twice on the same cause of action. In truth a binding promise to *A* to pay £100 to *B* confers no right upon *B* in law or in equity. It confers an authority upon the promisor to pay the money to *B* but *A* may revoke it any time."

Case Law.

In *Sprat v. Agar*² *A* promised *B* that if the daughter of *B* would marry *A*'s son, he would settle certain lands upon them. Held that the son had a right to sue the father-in-law in virtue of the wife's right because Consideration moved from her. Exception was in the case of privity of blood between the person from whom the Consideration moves and the beneficiary was held sufficient to enable such a person to sue³. This was approved in *Dutton v. Poole* (1688, 2 Lev. 210). The Consideration of love and affection was discussed in *Sharrington v. Strotton* (Plowden, 298). Scroggs C. J. said: "There is such an apparent Consideration of affection from the father to his children for whom nature obliges him to provide, that the Consideration and promise to the father may well extend to the children". The general principle that a stranger to the Consideration cannot recover on a promise for his benefit was laid down in *Price v. Easton*, 4 B and Ad. 433. Easton promised *X* that if *X* would work for him, he would pay a sum of money to Price. Price did the work and on Easton's failure to pay the money sued him. Held that he could

¹ *Contracts* s. 62.

² 1658 3 Cro. 619.

³ *Bourne v. Mason* 1660 (1 Vent. 6)

not recover because he was not a party to the contract. Lord Denman C. J. said: "The plaintiff did not show any Consideration for the promise moving from him to defendant." Littledale J. said: "No privity is shown between the plaintiff and the defendant." Taunton J. said: "It was consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between X and the defendant." Patteson J. said: "There was no promise to the plaintiff alleged." *Dutton v. Poole* decided that where A made a binding promise to X to do something for the benefit of the son or daughter of X, the nearness of relationship would give a right of action to the person interested. But this is no longer law. In *Tweddle v. Atkinson*¹ it was stated that it is now established that no stranger to the Consideration can take advantage of a contract though made for his benefit. The rule limiting the right to bring *assumpsit* to the person from whom the Consideration moves is without an exception. In *Cavalier v. Page*² the action was brought against the owner of a dilapidated house who had contracted with his tenant to repair it, but failed to do so. The tenant's wife who lived in the house and was well aware of the danger was injured by an accident caused by the want of repair. Held the wife being a stranger to the contract had no claim for damages against the owner. Lord Loreburn. Lord Chancellor said: "I find no right of action in the wife of the tenant against the landlord either for letting the premises in a dangerous state or for failing to repair them according to his promise. The husband has sued successfully for the breach of the contract, but the wife was not a party to any contract. Accordingly the appeal fails." Lord Macnaughton quoted Erle C. J.'s remarks in *Robbins v. Jones* (1863 15 C.B.N.S. 22): "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down

¹(1861) 1 E. and S. 393.²1906, A. C. 428, 429, 432.

house, and the tenant's remedy is upon his contract, if any." Lord Atkins said: "It is well established that no duty is at law cast upon a landlord not to let a house in a dangerous or dilapidated condition, and further if he does let it while in such condition, he is not thereby rendered liable in damages for injuries which may be sustained by the tenant, his (tenant's) servants, guests, customers or others invited by him to enter the premises by reason of the defective condition¹." In *Cameron v. Young*² the wife and children of the tenant of a dwelling-house are not entitled to recover damages from the landlord for loss and injury through illness caused by the insanitary state of the premises 'because they were not parties to the contract of tenancy' and *Cavalier v. Pope* (1906 A.C. 428) was followed.

The idea that a stranger should be permitted to sue has been favoured by eminent judges. Rolfe C. J.³ decided that when a father gave to his son goods on condition that the son should pay twenty pounds to another, an action could be brought against the son by that third person. Lord Holt and Lord Mansfield approved this right. The historical explanation of this rule that none but those in privity with Consideration can maintain an action on the promise is the direct result of the original idea of assumpsit. The original idea was to give redress for damages incurred by the non-fulfilment of a deceitful promise. The person who has suffered the detriment is allowed to sue upon breach of the promise. This rule is a procedural one and is peculiar to the action of assumpsit. The rule that a stranger to the Consideration cannot maintain assumpsit does not mean that the promisor does not owe any legal duty to the person for whose benefit the contract is made. He owes a duty to the stranger. The contractual duty exists and we must admit that the duty is one owing to such third person. The remedy by action of assumpsit is not as

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¹ 15 Har. L. R. p. 784.

² *Contracts*, 8th ed. Vol. I.
 Book I, pp. 466-468.

¹ *Lane v. Cox* 1897, 1 Q.
 B. 415.

² 908 A. C. 176, Per Lord

Robertson pp. 179-82.

³ In *Starkey v. Mill* (1651)
 Style 296.

broad as the limits of contractual liability. The deficiency of remedial law under the Common Law system of actions is very clearly seen in this case. There are two ways of remedying this defect. I—To develop the remedy of assumpsit and make it coextensive with contractual duty so that the stranger to the Consideration to whom performance is due can sue on the promise. II—To abolish the action of assumpsit and allow a civil action on the facts of the case. The first suggestion could be rendered effective in the form of *Indebitatus* because the action of assumpsit is broad enough to include any legal duty and the remedy could be extended to enable a third person to sue on all contracts made for his benefit. The English courts have hesitated at this point. If X delivers money to Y to be given over to Z, Z can sue in *debitatus* for money had and received or for money paid to his use. The test may thus be applied: Was it the intention of the contracting parties to bestow a benefit on a stranger or not? The contract must be made for the benefit of a third party and he must be the party intended to be benefited. Williston¹ has tried to show that the test is inadequate because there are many cases in which the interest of one of the contracting parties is much more obviously intended to be protected than the interest of the third party, *e.g.*, one contracting party exacts a promise from the other party to pay a debt. The action which the stranger brings on the promise made for his benefit is not an action of assumpsit on the contract, but an action on the case in the nature of assumpsit. Parson² says the obligation on which a stranger is permitted to sue is not an assumptual obligation created by the contract, but is an obligation in the nature of an assumpsit created by law on the facts of the case. Here we see the idea of the branch of the law of *quasi contract*³.

In the Law of Insurance, the Consideration (premium paid) moves from the assured but the promise evinced

¹ 15 *Harv. L. R.* p. 786.

² Keener, *Quasi Contracts*

³ *Contracts*, 6th ed. Vol. I, (1893), p. 307—390.

Book I, pp. 466—468.

by the policy binds the assurer to make payment to a third party. In all jurisdictions the beneficiary is allowed to sue at Law and in two cases only was this end accomplished by Statute. In England by the married Woman's Property Act, 1882,¹ it is enacted that a married woman may effect a policy of insurance upon her own life or on the life of her husband for her separate use ; and a policy of insurance by a married man on his own life if so expressed on its face may inure as a trust for the benefit of his wife and children, etc.

RULE IV.--An act or forbearance constituting the Consideration for a promise must be of some Legal value but need not be an adequate return for the promise.

B owned two boilers. *F* asked to allow him to weigh them on condition that he returned them in good condition. *F* took the boilers to pieces in order to weigh them and returned them in this state. *B* sued *F* for breach of promise. Held the defendant was liable. "The Consideration is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers²." In *Haigh v. Brooks* (1839, 10 A. & E. 309) the defendant obtained a certain document from the plaintiffs believing that it was a guarantee, (though really it was not enforceable) and agreed to give a sum in Consideration. The plaintiffs sued on the promise. Held that "the plaintiffs had been induced by the defendant's promise to part with something which they might have kept and the defendant obtained what he desired by means of that promise." The desire to carry out the wishes of deceased person does not amount to a Consideration. Motive is not the same thing with Consideration. Consideration means something of some value in the eye of the law, moving from the plaintiff³. Defendants were possessed of a process, for which a

¹45 and 46 Vict. C. 75, 1838, 8 Ad. and U. 743.

s. 11.

²*Thomas v. Thomas*, 1842,

³*Bainbridge v. Firmstone* 2 Q. B. 851.

patent had been taken out, for the utilisation of sewage in England but not for the foreign city of *B*. They agreed to sell to plaintiff for £1,500 the sole and exclusive right to use and exercise the patent in *B*. Plaintiff was aware that by the law then existing at *B*, no exclusive right to use the process there could be obtained. The object of the plaintiff in buying the exclusive right was that he might form a company for using the process in *B* and might induce persons to take shares in the company under the belief that if the company bought of the plaintiff the right sold to him by the defendants, the company would be entitled to the exclusive use of the process in *B*. Plaintiff sued defendants to recover the sum, on the ground that as there was no exclusive right to the use of the process in *B*, Consideration had failed. Held, no action could be maintained because : (1) Although the defendants ostensibly sold the exclusive right to use the process at *B*, yet the plaintiff's object being to float a company and induce persons to take shares in it, he had intended to buy the right, whether exclusive or not, and he had in fact obtained that for which he had paid the money. (2) That there was no fraud on the shareholders. Jessel M.R., Kelly C. B., Mellish L. J., and Denman J., agreed and affirmed the judgment. In *Pay v. Smith*¹ (1901, 17 *Times L. R.* 471) the defendant in Consideration of the plaintiff revealing to her full particulars of a sum of money to which she was entitled, (she stating that she was unaware of having any right or title of any money not already in her possession) agreed in the event of the money being recovered by her to pay the plaintiff a sum equal to one-third share of the net amount recovered. Justice Farewell held the plaintiff was only entitled to the one-third if he disclosed something before unknown to the defendant. In *Pilkington v. Scott* (15 *M. and W.* 657) the contract was not under seal. Alderson B. said : " If it be an unreasonable restraint of trade, it is void

¹*Begbie v. The Phosphate Sewage Co., Ltd.*, 1876, *L. R.* 1 Q. B. 679, C. A.

altogether ; but if not, it is lawful, the only question being whether there is a Consideration to support it ; and the adequacy of the Consideration the court will not inquire into but will leave the parties to make the bargain for themselves." In *Hyams v. Stuart King* (1908 2 K. B. 695 C. A.) it was decided by Sir Gorell Barnes President and Farwell L. J. (Fletcher Moulton J. dissenting) that the forbearance of the plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, constituted a good Consideration for the fresh agreement and that the plaintiff was entitled to recover. The promise was made in Consideration that the plaintiff should not for a time endeavour to enforce his claim and should not, if the defendants paid the amount thereof within the agreed time, take any steps to inform the defendant's customers and others of the defendant's failure to meet his void engagement because if the plaintiff did so, it would injure the defendant's betting business. The mere giving of time to pay that which cannot be enforced does not amount to Consideration. But apart from the question of illegality and unlawfulness, the second part of the alleged Consideration moving from the plaintiff would be within the ordinary definition of good Consideration, sufficient to ground an action.

Inadequacy is not in itself a ground to set aside a contract. But it may raise a presumption of fraud or undue influence where circumstances are such as to constitute a fiduciary relation between the parties. The court will not grant specific performance of a contract where it appears that the parties had not equal knowledge of the facts. In law value means money value. If an act cannot be estimated in money value, the court will hold that the act is of no value. The amount of the value is quite immaterial. The law is very careful to ascertain that there is something of a money value in exchange for the promise. It must be a fair equivalent for the promise. The parties are the proper judges of that equivalent. If the promisor gets what he bargained for, and it is of some value, the promise is legally binding. The Consideration must be real, it need not be

adequate, and that Consideration may be some benefit to the promisor or some detriment to the promisee. But as one person cannot obtain a right from another person without some forbearance on the part of that other, the most important point of value in the eye of the law is that the promisee has suffered detriment. Pollock¹ writes :
 “ It does not matter whether the party accepting the Consideration has any apparent benefit thereby or not ; it is enough that he accepts and that the party giving it does not thereby undertake some burden or lose something which in contemplation of the law may be of value.”

As a general rule the validity of a contract is not affected on account of inadequate Consideration. But the Court will take into account surrounding circumstances, *e.g.* if a contract is in restraint of trade, the Court in order to determine if the restraint is reasonable or not between the parties, will look into the adequacy of Consideration, for if such a contract is not reasonable, it will decide that it is void as opposed to public policy ; in order to determine whether a contract is voidable on account of fraud, duress or undue influence, the Court will look into the adequacy of the Consideration because it is one of the circumstances from which fraud may be inferred. But it is not in itself sufficient to lead to the conclusion of fraud, etc., unless the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition². Lord Thurlow's *dictum*³ was that “to set aside a conveyance, there must be an inadequacy so great, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it”.

Inadequacy of Consideration must be distinguished from partial absence of Consideration, partial failure of Consideration, part payment on account, or a mere

¹ *Contracts* p. 168.

Per Lord Westbury.

² *Tennent v. Tennents*
 (1870 L. R. 2 Sc. and D. 6, 9)

³ *Gwynne v. Heaton* (1778
 1 Bro. C. C. 1. 9).

advance made on a bill which is pledged or deposited as security. Harsh and unconscionable dealings between lender and borrower are regulated by the Money Lenders Act, 1900 (63 & 64 Vict. c. 51.)

RULE V.—The thing promised at the time of the Agreement must not be Indefinite, Illegal, Impossible or Contrary to public policy.

There are some agreements which from their nature cannot be enforced in a court of law, *e.g.*, the services rendered by a barrister when acting as an advocate are of an honorary nature¹. In *Westhead v. Spronson* (1861 6 H and N 728) *A* promised at the request of *B* to supply such goods as *C* required and *A* might choose to supply; there was no Consideration for the promise by *B* because *A* was not bound to supply anything. In *Collins v. Godfrey* (1831, 1 B. & A. 950) a witness received a subpoena to appear at a trial, a promise to pay him beyond his expenses was based on no Consideration. If by reason of a general rule of law or of a subsidiary obligation one party is already under a duty to another, an act, forbearance or promise thereof in whole or in part cannot be any Consideration for a promise by that other.

If the promisee is already under a legal obligation to do something for a third person can he enter into a promise to perform that very thing at the request of the promisor? 'A person may promise to a third person to do what he is already bound to do by contract with another; and such promise is a sufficient Consideration to support a new Consideration with the third party².' Chitty³ writes: "Though a man may be bound by his promise to one person to do a certain thing, he may make a valid promise to another to do the same thing⁴." If *X* is under a contractual obligation to *Y*, his performance or promise to perform his

¹ *Kennedy v. Brown* (1863, 13 C. B. N. S. 677).

² *Leake, Contracts*, p. 445.

³ *On Contracts*, p. 32.

⁴ *Scotson v. Pegg* 1861, 6 H. and N. 295; *Morton v. Brown* (1837) 7 A. and E. 19.

contract with *Y* at the request of *Z* is a real Consideration for the promise by *Z*, because *X* does or promises to do something in exchange for *Z*'s promise which he was not at the date of that promise under a legal duty to do on behalf of *Z*. In *Shadwell v. Shadwell* (1860) 9 C.B. N.S. 159, plaintiff had promised to marry *X*. His uncle promised him in writing that if he married *X*, he should receive £150 a year during the uncle's life time. He married *X*. The annuity fell into arrear; the uncle died and the plaintiff sued his executors. Erle C. J. and Keating J. regarded the uncle's promise as an offer capable of being a contract when *X* married *Y*. Byles J. dissented, and held that the plaintiff had done no more than he was legally bound to do. Erle C. J. said that "although a man's marriage with the woman of his choice is in one sense a boon, yet as between him and as person promising an income to support a marriage, it may well be also a loss and so a real Consideration. The plaintiff may have made a most material change in his position and induced the object of his affection to do the same and may have incurred pecuniary liabilities resulting in embarrassment which would be a loss if the income which the uncle has promised to provide should be withheld; and if the promise was made in order to induce the parties to marry, the promise would be in a legal sense a bequest to marry." In *Scotson v. Pegg*, 1861 (6 H.&N. 295.) Scotson promised to deliver to *P* a cargo of coal then on board a ship belonging to *S* and *P* promised to unload it at a certain rate of speed. *P* did not carry out the contract. *S* sued *P*. *P* pleaded that *S* had agreed to deliver coals to *X* or *X*'s orders and *H* had made an order in favor of *P*. Hence *S*'s promise to deliver coals to *X* was no more than he was bound to carry out in his contract with *X*. *P* alleged that there was no Consideration to unload speedily. Held that there was real Consideration for the promise of *P* and judgment was given for *S*. Martin B said: "I am of opinion that the plea of *Pegg* is bad in principle and in law. It is bad in law, because the ordinary rule is that any act done whereby the contracting party receives a benefit

is a good Consideration for a promise by him. It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals or it may be that the plaintiff detained them for demurrage. In either case there would be good Consideration that the plaintiffs who were in possession of the coals would allow the defendant to take them out of the ship. Is it any answer that the plaintiffs had made a prior contract with other persons to deliver the coals to their order upon the same terms and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into". Wilde B. said: "If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot say why such a promise should not be binding".

In *Synge v. Synge* (1894, 1 Q.B. 466) a promise was given to pay money in Consideration of a marriage taking place and the promise was a part of the engagement to marry. In *Hammersley v. De Biel* (12 Cl. & F. 62) a promise to pay money was an inducement to the engagement. In *Skeete v. Silberbeer* (11 T.L.R. 491) promise to pay was made in Consideration of an immediate fulfilment of the promise. In *Shadwell v. Shadwell* the nephew at the request of his uncle abandoned or agreed to abandon a right which he might have exercised and the abandonment of a right has been held to be Consideration for a promise. Anson¹ says: "Whether the promise is conditional on the performance of the contract made with the third party, or whether it is given in return for a promise to perform, does not seem to make any difference in principle. If we say that the Consideration is the detriment to the promisee in exposing himself to two suits instead of one for the breach of contract we beg the question for we assume that an action will lie in such a promise. If we say that the Consideration is the fulfilment of the promisor's desire to see the contract

¹*Contract*, ed. 1912, 115.

carried out, we seem to confound motive and Consideration. At least, one may say that on principle the performance or promise to perform an outstanding contract with a third party is of itself Consideration for a promise". Leake¹ was of opinion "that if a man has already contracted with another to do a certain thing, he cannot make the performance of it a Consideration for a new promise to the same individual; but where there has been a promise to another to do a certain thing, it is impossible to make a promise to another to do the same thing, which may form a Consideration in a contract with that other." In Leak's *Contracts* (6th ed.) it is stated that a person may promise to a third party to do what he is already bound to do by contract with another; and such promise is a sufficient Consideration to support a new contract with the third party, *e.g.* a promise by a debtor to pay an assignee of the debt². Pollock³ says: "The seeming paradox vanishes when we bear in mind that the true test of Consideration is not benefit to the promisor but detriment to the promisee. As this was wholly ignored in *Scotson v. Pegg* the judgments in that case are un-instructive." Prof. Williston proposed to meet the difficulty of cases of this nature by constructing a new theory⁴. Langdell has discussed the theory of Prof. Williston⁵. Ames holds that both promises and performance are good Consideration in this class of cases. But if we accept this view we have to assume that any detriment in fact to the promisee will do⁶. Pollock⁷ is of a contrary opinion. Harriman⁸ agrees with this view. Pollock gets the following result, "there is no objection in any case to a promise by John to Peter not to rescind a subsisting contract with William, or to accept a waiver or release of it; and a promise in that form would certainly be a good Consideration." There is no direct decision,

¹*Contracts*, 1867, 1st ed.
p. 321.

¹⁴14 *Harv. L. R.* 496.

²*Morton v. Brown* (1857,
7 *L. J. Q. B.* 104.

¹²12 *Harv. L. R.* 515; 13
Harv. L. R. 29.

³*Contracts*, p. 197 n.

⁷*Contracts*, 195—199.

⁴3 *Harv. L. R.* 27.

⁸*Contracts*, 67.

he says, on the validity of a promise to perform an existing contract with a third person. He regards *Shadwell v. Shadwell* and *Scotson v. Pegg* to be wrongly decided, or at any rate not on right grounds. "What is here maintained is that a promise made for a valuable Consideration and otherwise good as between the parties is not the less valid because performance will operate in discharge of an independent contract already existing¹. American jurists seem to favour the view of Sir William Anson². The following is a summary :—

(1) Whether the performance of an existing contractual obligation is good Consideration or not.

(2) Whether a new promise made to a new promisee is good Consideration or not.

Sir William Anson says : "On principle the performance or promise to perform an outstanding contract with a third party is not of itself Consideration for a promise³". Prof. Williston is also of the same opinion⁴. Prof. Ames⁵ seems to be of opinion that a new promise of the same thing to the same promisee may be good Consideration. Both the performance and promise are good. Prof. Langdell⁶ maintains that a *promise* to perform a contract with a third party is a good Consideration although actual performance would not be on the ground that such promise gives a right of action against the promisor which constitutes a legal detriment⁷. Harriman⁸ says : "It is true that a promise to perform, or the actual performance of, legal obligation is, in general, not a valid Consideration ; but there seems to be no satisfactory reason why this rule should not be limited to cases where the obligation is irrecusable or is profitable to the promisor or to the public of

¹ See Leake, 6th ed. 449.

13 *Harv. L. R.* 29.

² See *Law Q. Review*, Vol. XX, p. 9; and 17 *Harv. L. R.* p. 71.

³ *Summary of Contracts*, ss. 54, 84.

⁴ 14 *Harv. L. R.* 496.

⁵ *Contracts*, 12th ed. p. 115.

⁶ 8 *Harv. L. R.* 27.

⁷ *Elements of the Law of Contracts*, 1896, p. 47.

⁸ 12 *Harv. L. R.* p. 515 and

whom the promisor is one. The rule might then be stated : " A promise to perform, or actual performance of an irrecusable obligation, or an obligation to the public or to the promisor is not a valid Consideration."

Leake¹ says : " Where there has been a promise to one person to do, a certain thing, it is possible to make a promise to another to do the same thing, which may form a valid Consideration in a contract with that other ". Pollock² says : " When we bear in mind that the true test of Consideration is not benefit to the promisor but detriment to the promisee, the paradox vanishes ". Prof. Joseph H. Beale, Jr., holds similar views on the subject³. Williston defines Consideration as something given by the promisee in exchange for the promise resulting in legal detriment⁴. Ames defines Consideration as an act or forbearance or promise by one person given in exchange for the promise of another, provided it is not contrary to public policy⁵. There is no real difference in the conception of Consideration, but each of these writers tries to emphasise his own point of view. Ames holds that though a promise may have a Consideration yet it may be quite insufficient and the law will not impose liability, while Williston asserts that though there is Consideration, the promise will, if public policy require, not be binding. Hence there is a difference in the view where Consideration of an agreement is the performance of a previously existing obligation. Williston says doing what one is bound to do is not a good Consideration⁶, while Ames is of opinion that public policy is not against holding one to his promise made on such Consideration⁷. Joseph H. Beale, Jr., shows that the result does not follow necessarily from the principle cited⁸.

Examination of the view that performance of a contractual duty is a Consideration.

Contractual
Duty and
Consideration.

¹ *Contract* 1st ed., p. 321.

² 12 *Harv. L. R.* p. 576.

³ *Contract* p. 197.

⁴ 8 *Harv. L. R.* p. 33.

⁵ 17 *Harv. L. R.* 71.

⁷ 12 *Harv. L. R.* p. 515.

⁸ 8 *Harv. L. R.* pp. 33, 36.

⁶ 17 *Harv. L. R.* pp. 71-82.

Ames has proved that in some cases such performance may be valid Consideration for a contract ; yet in most cases the authorities clearly hold that it is not. To lay down a general rule that such performance is or is not a valid Consideration is unsound. Beale states that it is not contrary to a man's duty to earn a second promise by the performance of his contract. Where that is the case, since there is Consideration for the second promise and the Consideration is not invalid or contrary to public policy, the second promise is binding. It may be stated in general terms that if the offer for either the bilateral or unilateral agreement was made while the offeree was bound by neither agreement, then both are binding.

Promise to
perform
Contractual
Duty.

Examination of the view that promise to perform a contractual duty is a Consideration.

A promise is an act and, therefore, if requested as a Consideration should be dealt with like any other act¹. If two persons are already bound by an agreement and one of them offers a new promise to the other to perform his original agreement, there is a renewal of the prior promise. 'Such a promise, which leaves the legal rights of the parties just where they are, creates no cause of action².' This is a mere reciting of words not expressing assent to the agreement. But if the promise given as consideration includes anything beyond the existing duty, the new contract is binding.

Where there is an existing contract with a third person, the objections just urged do not exist. The promise is necessarily an assent to a new agreement and therefore may be a Consideration ; and while it is the duty of the party to keep his prior contract, he is under no duty to enter into an agreement with a third party to keep it. His agreement to keep the prior contract is a good Consideration for a new promise of a third party. Prof. Williston urges that a promise is not a valid Consideration unless the thing promised would amount to some

¹ 13 *Harv. L. R.* p. 31.

Gridley, 15 C. B. 295.

² Maule J. in *Deacon v.*

legal detriment and in neither case would there be a binding contract because if the act itself would not be a detriment the promise to act could not be any Consideration ; a promise cannot be more than the thing promised. Prof. Beale examines the position of the respective parties to the two agreements and tries to show that a promise to act is better than the act itself because the promisee gets by the promise an assurance to him that the thing will be done by reason of the agreement. He asks for the promise because he desires this assurance and he gets by it what he gets in every bilateral agreement. The promisee gets personal assurance. After performance the position of the parties is the same, whether the promise is made or not ; but between offer and performance the position is that of one who has agreed to insure his own act. The distinction made by decisions between a promise to a party to the existing obligation and one to a third party is in accord with the accepted view of Consideration and of obligation. With this view Langdell, Ames and Pollock are in perfect accord.

To conclude, it is quite possible that there may be a contract for the same thing with another and it is no concern of the promisor to refer to it. It is a matter primarily between the parties to that contract. To inquire into the condition of obligations of one of the parties to a stranger to the contract serves no purpose of justice. Harriman agrees that it will be a more mechanical application of the rule of Consideration without any justification and in this respect the English Rule is to be preferred.

An existing debt may form a sufficient Consideration for a negotiable security given by the debtor to the creditor on account of the debt. In *Scott v. Fairlamb*¹ it was decided that a negotiable security is equivalent to a conditional payment of debt. In *Walker v. Rostron*² the Court of exchequer held that a debt payable in

¹(1883, 53 L. J. Q. B. 47 (C. A.). ²9 M. and W. 411.

futuro was a good Consideration for a promise by the debtor's agent to appropriate funds in his hands by way of security for the debt. The distinction seems to be between an executed transfer and an executory promise. In *Wigan v. English and Scottish Law Life Assurance Association*, Parker J. said: "There is no authority against and a great many authorities in favour of the proposition that in order to have a Consideration for a further security there must be an agreement express or implied to give time or some further Consideration, or else there must be actual forbearance which *ex post facto* may become the Consideration to support the deed".

Marks of
Legal
Value.

The marks of legal value are—(a) definiteness, (b) legal and physical possibility; (c) the promisee must not be already legally bound to do or forbear for the promisor; (d) legality.

(a) Definiteness.—The nature of the act or forbearance of the promise thereof must be definitely stated either in express or implied terms of the contract so that a reasonable man can say what was the intention of the parties. Otherwise it is not possible to estimate at a money value. Pollock¹ says the principle of all those cases may be summed up in the statement made in so many words by the Judges that the promisor has got what he bargained for. The law will be satisfied that there was a real and lawful bargain. Anson² says Consideration need not be adequate but it must be of some value in the eye of the law. In *White v. Bluett*³ a son gave a promise to his father to leave off complaints of the father's conduct in family matters. Held that not to bore his father was too vague to form a Consideration for the father's promise to waive his rights on the note. In *Crears v. Hunter*⁴ A's father was indebted to B and A gave a promissory note to B for the amount due. B thereupon forbore to sue A's father for the debt. The question was: Did A offer the note in Consideration

¹ *Contract*, p. 187.

² *Contract*, ed. 13, p. 97.

³ 1853 23 L. J. Exch. 36

⁴ 1887, 19 Q. B. D. 345.

of a forbearance to sue? Lord Esher M. R. said: "It was argued that the request to forbear must be express. But it seems to me that whether the request is express or is to be inferred from circumstances is a mere question of evidence. If a request is to be implied from circumstances it is the same as though there were an express request."

(b) Legal and physical possibility.

When Consideration is executory, the promise by one of the contracting parties in exchange for the promise of the other party may be such as to do something which at the time of the promise was legally and physically impossible to carry out owing to some mistake. The question in such cases is whether the impossibility renders the promise of that party of no value. A promise to do an impossible thing is binding unless it is: (i) A promise to do something which is impossible by the ordinary rules of law, *e.g.*, in *Harvey v. Gibbons*¹ the Court held that the bailiff could not sue; that the Consideration furnished by him was illegal, for the servant cannot discharge the debt without the authority of his master. Here the word illegal means impossible; in (ii) A promise to do something which reasonable men guided by the knowledge of the times would consider in its nature physically impossible, for such impossibility shows that there was no real intention on the part of the parties to be bound to carry out the promise. In *Clifford v. Watts*² the lessee covenanted to dig not less than 1,000 tons of a certain kind of clay on the land demised, in every year of the term, but there was no such clay on the land. Brett J. said: "I think it is not competent to a defendant to say that there was no binding contract merely because he has engaged to do something which is physically impossible. I think it will be found in all cases where that has been said, that the thing stipulated for was according to the state of the knowledge of the day so absurd that the parties cannot be supposed to have so contracted." In testing the

¹1675, 2 Lev. 161.

²1871, L. R. 5 c., p. 577.

seriousness and validity of an agreement by the presumed intention of the parties we must remember that they are also presumed to have the ordinary knowledge of reasonable men. "The Court", says Pollock¹, "will apply the test of what reasonable men would intend, if they had thought of the contingency." Some years ago the validity of an agreement to make a flying machine was regarded as doubtful; but no one would now doubt that such an agreement might be binding. Willes J.² said "Cases may be conceived in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery or be liable in damage for non-performance" or (3) A promise made through mistake either of law or of fact or of mixed fact and law to do something which is impossible when the parties enter into contract on the supposition that it is possible. In *Cooper v. Phibbs*³ we have it that if one person agrees with another to hire or buy an estate from him which both believe to belong to some third person, but which really belongs to one of the contracting parties, the contract will not be enforced and this is not an infringement of the maxim '*ignorantia juris haud excusat.*' Lord Westbury said: "In that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. The private right of ownership is a matter of fact; it may be the result also of matter of law; but if the parties contract under a mutual mistake, and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake." In *Clifford v. Watts*⁴ the existence of clay under the land was the basis of the contract between the parties. In *Hills v.*

¹ *Contract*, p. 419

² See 5 *Vin. Abr.* 110, Condition (c); 1 *Roll Abr.* 419;

Shep. Touch-stone, 164.

³ (1867) L. R. 2 H. L. 170.

⁴ *Supra*

Sughrue¹ the contract was to go to a certain island and there load a full cargo of guano, but there was not enough guano there to make a cargo. Held that the absolute contract to load a full cargo of guano at that island was not discharged because of there not being enough guano to make a cargo.

(c) The act or forbearance or promise thereof is such as the promisee was not already legally bound to do or forbear for the promisor.

If the promisee by the contract is doing what he is already bound to do for the promisor, the promisor gets nothing of value in law in Consideration for his promise. But if the promisee is not under any legal duty to the promisor or if the promise is to do something extra or something which is quite different from what he had legally agreed to do for the promisor, there is something of value in law in Consideration for the promise. In *England v. Davidson*² a policeman not only gave information but collected evidence and was thereupon held entitled to the reward. Lord Denman C.J. said: "I think there may be services which the constable is not bound to render and which he may therefore make the ground of a contract." In *Stilk v. Myrick*³ Lord Ellenborough said: "Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. But the desertion on the part of the crew is to be considered an emergency of the voyage as much as death, and those who remain are bound by the terms of their original contract to bring the ship in safety."

(d) Legality :—

The act or forbearance may be unlawful in itself, *e.g.* murder is an unlawful act, and such act or forbearance cannot be any forbearance for a promise. The contract is void because the Consideration is not legal. But if the act or forbearance is innocent in itself, such as hiring

¹ 1846, 15 M. and W. 233.

³ 1809, 2 Camp. 317.

² (1840) 11 A. and E., 856.

a cab, but it is done for an unlawful object, it is unlawful. Consideration so far as the promisor is concerned only if the ulterior purpose be known to him. But if the other party is quite ignorant of the unlawful intention, he can enforce the contract. The defendant cannot set up his own unlawful intention as a defence to the action unless the other party was quite aware of it. But if the party knows the unlawful intention of the other, before the contract is carried out, it is quite lawful for him to refuse to be bound by the contract. And if after knowledge of unlawful intention he allows the contract to be performed, he can sue to recover anything which may be due to him in respect of that contract because he had full knowledge of the unlawful intention of that other and consented to become a party to an unlawful agreement. In *Cowan v. Milbourn*¹ *M* let a set of rooms to *C* for certain days; then he discovered that *C* proposed to use the rooms for the delivery of lectures which were unlawful because blasphemous according to the statute 9 and 10 Will. III, c. 32. *M* refused to carry out the agreement. Held he was entitled to do so².

Wagers.—All gaming contracts are wagers. The term gaming includes those wagers which are the result of sports or pastimes. Gaming means playing a game for stakes hazarded by players. The distinction between wager and gaming contract is not important to the immediate parties to them but is important in determining the effect of certain remote transactions connected with them. In a wager each party must have the chance to win or lose³. The intention of the parties is a question of fact and the court is at liberty to probe into the transaction to find out if it is a genuine or gambling transaction⁴. Pollock⁵ gives a summary of statutes by which

¹ 1867, L. R. 2 Ex. 230.

² Bullen and Leake on Pleading, pp. 599–603.

³ Roberts v. Harrison, 1909, 101 L. T. 540; Lockwood v. Cooper 1903, 2 K.B. 428.

⁴ The Law of Gambling Civil and Criminal, by Coleridge

and Hawksford (1895) ch. X; Speculation with Stock Exchange, pp. 207–221; Obligations arising out of Void Transactions, ch. VIII, pp. 165–197.

⁵ Law of Contracts, pp. 707–711.

certain contracts are prohibited or penalised. They relate (1) to the security of the revenue ; (2) to the protection of the public in dealing with certain articles of commerce ; (3) to dealing with certain classes of traders ; (4) to the regulation of the conduct of certain kinds of business.

Distinction between void, voidable and unenforceable
Consideration.

A void contract has no legal effect. It is a nullity ; a voidable contract can be enforced or rejected at the option of one party only ; an unenforceable contract is valid in substance but it has some technical defect in consequence of which one or either party is not allowed to sue upon it. It is called an agreement of imperfect obligation.

(a) *A* may sell a watch to *B* thinking him to be *C*. *A* afterwards sells that watch to *D*. The transaction between *A* and *B* is void and *D* can acquire no right in that watch because *B* had no ownership in it. No one can give a better title to another than he has got himself.

(b) Under the delusion that the market is falling *A* sells a watch to *B*. Before *A* has discovered the fraud, *B* re-sells the watch to *C* without knowledge of the fraud and pays value for the watch. *C* has acquired good title to the watch¹.

In the first case the fraud takes the form of personation. The watch is obtained by a false representation and therefore the third person cannot acquire any title to the watch. In *Cundy v. Lindsay*² Lord Cairns said : " They knew nothing of him and of him they never thought. With him they never intended to deal. Their minds never for an instant of time rested upon him and as between him and them there was no consensus of mind."

The difference between what is voidable and unenforceable is a difference between substantive and

Void,
Voidable
and unenforce-
able Consi-
deration.

¹*Babcock v. Lawson*, 4 Q. B. D. 394.

²3 App. Cases 459.

adjective law, *e.g.* a contract may be perfectly good but incapable of proof on account of the Statute of Limitation or want of writing under the Statute of Frauds or failure to affix a stamp under the Stamp Act.

Failure of
Consideration.

The Consideration may be divisible or indivisible. If there is failure in the case of indivisible Consideration the whole contract fails and the other party is freed from the liability. That failure may arise before or after the performance may be due. Again the failure may be slight or substantial. The failure of performance must have been such as to amount in effect to a renouncement of the contract by the other party; it must go to the root of the promise so that the other party may declare that he has lost what he cared to get under the contract and that further performance cannot make up for the fault. This is a question of fact¹.

The injured party may defend himself on the ground of breach or may sue for damages for injury done by reason of the breach and if he has fulfilled some part of his promise, he may, if that which he has done can be measured in money value, sue both for damages and also for *quantum meruit* for so much value as he has done. It is altogether a distinct contract and arises from the offer which one party has made by doing his part and the other side by accepting it².

RULE VI.—A valuable Consideration does not consist in a mere motive to return a benefit already Rendered.

In *Eastwood v. Kenyon*³ E. had been guardian and agent of Mrs. K., and while she was a minor had incurred expenses in the improvement of her property; he did this voluntarily and in order to do so borrowed money and gave a promissory note. Mrs. K. after attaining her majority promised to pay the expenses incurred and her husband agreed to pay the note. She was sued on that promise. The Court held that the Consideration was wholly past. Lord Denman said: "Indeed the

¹ Sale of Goods Act s. 31, 11th ed. p.
Chalmers 6th ed. pp. 73, 74.

³ 1840, 11 A. and E. 438.

² *Cutter v. Powell* 2 S. L. C.

doctrine would annihilate the necessity for any Consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."

The principle of moral obligation was very strongly urged by Mansfield C. J. who said, "It has long been established that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action"¹.

Lord Mansfield thought that a promise to do what the promisor is already under a moral obligation to do is binding. He was much influenced by the old cases which declared that a promise based upon a Consideration previously executed upon request was good. In *Hawkes v. Saunders*² the action was brought against an executrix in her own right to recover a legacy which she had promised to pay to plaintiff "in Consideration of sufficient assets being in her hands." Lord Mansfield said; "Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori* a legal or equitable duty is a sufficient Consideration for an actual promise. Where a man is under a moral obligation which no Court of Law or Equity can enforce and promises, the honesty and rectitude of the thing is a Consideration.....The ties of conscience upon an upright man are a sufficient Consideration." Lord Kenyon questioned the doctrine. Bosanquet and Piller have examined the then doctrine of moral Consideration and showed that Lord Mansfield's generalisation was wider than the authorities on which it was based. They concluded that an antecedent moral obligation was not of itself sufficient to sustain a promise. In *Littlefield v. Shee*³ Lord Tenterton observed that the doctrine of moral obligation was a sufficient Consideration, for a subsequent promise is one which should be received with limitation. *Eastwood v. Kenyon*⁴ decided that a moral obligation cannot

¹Lee. v. Muggeridge (1813) ³1831, 2 B. and Ad. 811.

⁵Taunt 46.

⁴1840, 11 Ad. and El. 438.

²Cowper 290.

give an original cause of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute. *Lee v. Muggeridge*¹ was overruled by the case of *Eastwood v. Kenyon*² when Lord Denman said. "The doctrine would annihilate the necessity of any Consideration at all". Since that decision the doctrine of moral obligation has found no support in any quarter.

Lord Mansfield applied the doctrine of moral Consideration to the promise of a discharged bankrupt in *Trueman v. Fenton*³. Anson⁴ says: "There are certain features common to all these cases. The parties are clearly agreed; the contract has been fulfilled for the benefit of one of the parties, while the other cannot get what he was promised, either because he has dealt with one who was incapable of contracting or because a technical rule of law forbids the agreement to be enforced. If the party who has received the benefit which he expected from the agreement afterwards acquires capacity to contract; or if the rule of law is repealed, *e. g.* Usury Act; or in the case of the Statute of Limitations, admits of a waiver by the person whom it protects, then a new promise based upon the Consideration already received is binding". These cases do not rest upon moral obligation at all.

RULE VII.—If one party abandons a *bona fide* claim, even though unfounded, or forbears to exercise the right or to assert the claim for an appreciable time that may be a valid consideration for the promise.

In *Wilby v. Elgee*⁵ actual forbearance at the defendant's request, though not for any specified time, was held sufficient. In *Jones v. Ashburnham*⁶ action was brought on a promise to pay £20 to the plaintiff in Consideration of his forbearance to sue for a debt which he

¹ *Supra.*

² 1840, 11 A. and E. 450

³ 1777, 2 Cowp. 544.

⁴ *Contract*, 13th ed. pp. 125-126.

⁵ 1875 L. R. 10 C. P. 497.

⁶ 1804, 4 East. 455.

alleged to be due to him from a third party deceased. The pleadings did not state that there were any representatives of the dead man towards whom this forbearance was exercised, nor that he had left any assets to satisfy the claim. Lord Ellenborough said: "How does the plaintiff show any damage to himself for forbearing to sue when there was no fund which could be object of suit, when it does not appear that any person in *rerum natura* was liable to him"? In *Hyams v. Stuart King*¹ the defendant was indebted to the plaintiff as a result of certain betting transactions and desired time in which to pay. The Gambling² Act 1845 (8 & 9 Vict. c. 109) would have been a defence to legal proceedings for the debt, but on the plaintiff threatening to declare the defendant a defaulter, the defendant promised to pay in a few days, if the threat were not carried out. Held that action could lie on this new promise and Consideration. Farwell L. J. said: "There is certainly nothing illegal in paying or receiving payment of a lost bet; it is one thing for the law to refuse to assist either party in their folly, if they will bet; it is quite another to forbid the loser to keep his word". In *Hyams v. Coombes*³ Lush J. said: "There must be an actual forbearance to exercise some legal right in Consideration of a promise to pay. It is not enough to show that there had been a threat to expose or that there had been a promise to pay. It must be shown that the parties intended to contract and that the defendant had in his mind that he was promising on account of a real Consideration. That being so, there was no contract". *Wilson v. Conolly*⁴ showed that a threat to expose was not a necessary ingredient in bringing about such a contract if the defendant was apprehensive of the consequences that might follow if the legal proceedings went on. This case came up on appeal from the County Court in which

¹1908, 2 K. B. at 725;

²*The Law of Gambling*, by Coleridge and Hawksford, Ch. VII, pp. 136-164.

³*Law Times Reports*, Friday May 17th, 1912, p. 413.

⁴*27 The Times Law Reports*, p. 212.

the judge's finding of fact was conclusive. The Court of Appeal did not decide that wherever a defendant said he was apprehensive of the consequences of being sued and promised to pay if not sued, that promise was one for valuable Consideration. Forbearance to sue a third person at the request of the promisor is a sufficient Consideration for his promise.

If *X* is indebted to *Y* for a certain sum, he cannot by paying a smaller sum at the request of his creditor, be discharged from his liability to pay the balance ; but if part is paid before the whole falls due, or something other than the payment of money is done by *X* at *Y*'s request, there can be a valid discharge for the whole debt. In Pinnel's case¹ the above rule was laid down and the House of Lords affirmed it in Foakes v. Peer².

Historical
Account.

Danvers J.³ said: "Where one has *quid pro quo*, there shall be adjudged a satisfaction. If one be indebted to me in forty pounds and I take from him 12*d.* in satisfaction of the forty pounds, in this case I shall be barred of the remainder". Fineaux J.⁴ said: "I think there is no difference between accord and satisfaction in money and in a horse. For notwithstanding the sum is less than that in demand, still when the creditor has received it by his own agreement, it is as good a satisfaction to him as anything else". But Brian C. J. said (in the same case): "The action is brought for £20 and the accord is that he shall pay only £10 which appears to be no satisfaction, for payment of £10 cannot be payment of £20. But if it were a horse, which horse is paid for according to the accords that is a good Consideration ; for it does not appear whether the horse is worth more or less than the sum in demand. And notwithstanding the horse may be worth only a penny, that is not material, for it is not apparent". Perkins J. agreed with Danvers and

¹ 1602, 5 Co. Rep. 117.

VI. f. 48 pl. 32.

² 1884, 9 App. Ca. 605.

⁴ In 1495 Y. B. 10 Hen. VII

³ In 1455 Y. B. 33 Hen.

f. 4 Pl. 4.

Fineaux, J. J. : " If a man be bounden to pay 100 marks unto the obligee, and the obligee accept of ten pounds for the obligor in satisfaction of the hundred marks, it is good performance of the condition ; and yet some have said the contrary, because ten pounds cannot be satisfaction for one hundred marks¹". But this protest was powerless against the logic of Brian C. J. In 1561 all the judges agreed that ' the payment of £20 cannot be a satisfaction for £10²'. Per Curiam : " Five pounds cannot be a satisfaction for ten pounds." In 1602 Coke's dictum in Pinnel's Case³ was given. In this case *C* gave *P* a bond for £16 on condition of his paying £8 on a certain fixed day. *P* sued on that bond and *C* pleaded in defence that he at the instance of *P* paid £5 before the due date and *P* accepted the said sum in full satisfaction of the whole debt of £8. Held, judgment must be given for *P* because *C* did not plead that he had paid the sum of £5 in full satisfaction (as he ought to have done) but pleaded the payment of part generally ; and that the plaintiff accepted in full satisfaction ; and therefore the judgment was given for 'insufficient pleading'. He ought to have pleaded that he paid it " in full satisfaction ". Then he would have won the case ; but it was resolved by the whole court that " payment of a *lesser sum on the day* in satisfaction of a greater cannot be any satisfaction for the whole because by no possibility can a smaller sum be a satisfaction to the plaintiff for a greater sum ". But the gift of a horse, hawk or robe can be good satisfaction, for it might be intended that a horse, hawk or robe might be more beneficial to the plaintiff than the money in respect of some circumstance, otherwise the plaintiff would not have accepted it in satisfaction. But if part were paid and accepted before the due date in satisfaction of the whole debt, it would be a good satisfaction in regard of circumstance of time ; a part before the day would be more beneficial to him than

¹*Perkin's Profitable Book*
Greening 1827 s. 749, p. 144.

1588, 4 Leon 81 pl. 172

²5 Rep. 117a.

³Dal. 49, pl. 13; Anon

the whole at the day and the value of the satisfaction is not material. Payment of part at the day and place cannot be, though accepted, satisfaction of the whole of the same kind¹. The same reasoning occurs in the *Commentary of Littleton* (ed. of 1829, 212b.) where it is said: "It is apparent that a lesser sum of money cannot be a satisfaction for a greater". In the days of Brian Consideration in its modern sense was unknown and the action of *assumpsit* was in its growth. To his mind whether ten pounds could be a satisfaction for twenty pounds was a question of simple arithmetic. Ten cannot be twenty; the part cannot be the whole. Coke reasoned: "It appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater". In *Baggage v. Slade* Coke² said, "If a man be bound to another by a bill in a thousand pounds and he pays unto him five hundred pounds in discharge of his bill, which he accepts and doth upon this assume and promise to deliver up unto him his said bill of a thousand pounds, this five hundred pounds is not satisfaction of the full amount, but yet this is good and sufficient to make a good promise and upon a good consideration because he has paid money and he hath no remedy for this again". In *Cumber v. Wane*³ the defendant pleaded to an action of *indebitatus assumpsit* that his own negotiable note for £5 had been given and received in satisfaction of the whole of the £15. The plaintiff objected that the plea was ill, 'it appearing that the note of £5 cannot be a satisfaction for £15. Even the actual payment of £5 would not do, because it is a less sum, much less shall a note payable at a future day'. Pratt C. J. said: "We all are of opinion that the plea is not good. If £5 (as is admitted) be no satisfaction for £15, why is a simple contract to pay £5 a satisfaction for another simple contract for three times the value?" In *Stock v. Mawson* Buller J. laid down the *dictum* "Whether an agreement by parol to accept a smaller

¹ *Goring v. Goring*, 1602
Yelv. 11.

² 1718, I, S.L. C. 11th ed., pp.
336-355.

³ *Bulstrode's Reports*, p. 162.

⁴ 1798. 1B. & P. 286, 290.

sum in satisfaction of a larger can be pleaded or not : I do not know. It was formerly considered that it could not, and was so decided in Coke's time. I think, however, there are some late cases to the contrary, and one in particular in Lord Mansfield's time, who said that if a party chose to take a smaller sum, why should he not do it? There may be circumstances under which such an agreement might not only be fair, but advantageous." In *Fitch v. Sutton*¹ that *dictum* had no effect. Lord Ellenborough based the rule upon Consideration : " There must be some Consideration for the relinquishment of the residue ; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*."

The doctrine of Lord Ellenborough has been adversely criticised by eminent judges. In *Couldery v. Bartrum*² Jessel M. R. said a creditor might take a horse, a canary or a tomtit, if he chose and that was accord and satisfaction, but by a most extraordinary peculiarity of the English Common Law, he could not take £19-6 in the pound. In *Brooks v. Whit*³ Dewey J. said : " This rule which obviously may be urged in violation of good faith is not to be extended beyond its precise import".

The doctrine as stated in Pinnel's case is that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole ; by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum. Ames⁴ defines his position. The doing of any act (not unlawful or against public policy) is such a detriment to the actor as will support the promise of another given in Consideration of that act. The payment of a part of the debt is an act and is therefore a good Consideration for the promise of the creditor to forego the residue of his debt. Hence Lord Ellenborough in *Fitch v. Sutton* (5 East 230)

¹1804, 5 East. 230.

²19 Ch. D. 394, 399.

³2 Met. 283, 285.

⁴12 Harv. L. R. 515.

was wrong. The rule in Pinnel's case, writes Pollock¹, 'though paradoxical is not anomalous.... Its numerical logic may be archaic, but it is strictly logical. The Court does not know judicially what a beaver hat may be worth, but it must know that £10 are not worth £20.' In *Foakes v. Beer*,² Pinnel's case was followed. Lord Blackburn dissented. In *Goddard and Son v. O'Brian*³ O'B. Was indebted to the firm of G for a sum of £125 for goods purchased. The claim was settled for £100 and O'B. passed a cheque for that amount payable to the firm of G. A receipt was given. Received the sum of one hundred pounds by cheque in settlement of the whole amount of one hundred and twenty-five pounds, on the said cheque being honoured. The cheque was duly paid. G. sued O'B. for the remaining twenty-five pounds relying upon the ground that the payment of a smaller sum than the debt due cannot be a satisfaction of the debt, and *Cumber v. Wane* was relied on. Held, there was a good accord and satisfaction by reason of the cheque being "a negotiable instrument" and judgment was given for O'B. Grove J. said: "The difficulty arose from the rule laid down in *Cumber v. Wane*. But that doctrine has been much qualified and I am not sure that it has not been overruled". In *Sibree v. Tripp*, 1846 (15 M. & W. 36) the judgments of Parke and Alderson B. B. are strong expressions of a contrary opinion. That case decided that the acceptance of a negotiable security for a smaller amount may be in law a satisfaction of a debt of a greater amount, and is a direct authority that the giving of a negotiable security is not within the rule of *Cumber v. Wane*. Huddleston B. said: "The doctrine of *Cumber v. Wane* if not actually overruled has been very much qualified". In *Smith's Leading Cases*⁴ it is stated that the general doctrine in *Cumber v. Wane* and the reason of all the exceptions and distinctions which have been engrafted on it may be summed up thus: "A creditor

¹ *Law of Contract*, p. 200.

² 1884, 9 App. Ca. 605.

³ 882, 9 Q. B. D. 37.

⁴ Vol. I, 11th ed., p. 348.

cannot bind himself by a simple agreement to accept a smaller sum ; such an agreement being *nudum pactum*. But if there is any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the Consideration sufficient to support the agreement". In *Foakes v. Beer*, 1884 (9 App. Ca. 605) the House of Lords affirmed the Appeal Court's decision. Lord Fitzerland said : "The question is whether there is sufficient legal Consideration for relinquishing the debt for interest. I am clearly of opinion that there is not. Lord Blackburn has shown very clearly that the resolution in Pinnel's case was not necessary for deciding that case, and that the principle on which it seems to rest does not appear to have been made the foundation of any subsequent decision of the Exchequer Chamber or of this House, and, further, that some of the distinctions which have been engrafted on it make the rule itself absurd. But it seems to me that it is not the rule which is absurd but some of the distinctions which have been granted on it. The resolution in Pinnel's case has never been overruled. For nearly three centuries it seems to have been adopted by judges. During that period it seems to have been understood and taken to be part of our law that the payment of a part of a debt then due, and payable, cannot alone be the foundation of a parol satisfaction and discharge of the residue, because it brings no advantage to the creditor and there is no Consideration moving from the debtor". *Foakes v. Beer* decided that at the same time and place at which £100 are payable (or of ten shillings at an earlier date, or at another place), that nothing less than a release under seal will make his acceptance of £99 in money at the *same time and place* a good discharge.

The Bills of Exchange Act, 1882, (Sec. 62) enacts that the holder of a bill of exchange or promissory note can discharge it by renouncing his right without Consideration, such renunciation must be made in writing on the instrument and must be delivered up to the party liable.

Bullen and Leake¹ say the defence of accord and satisfaction consists in two parts of something given or done by the defendant to or for the plaintiff and accepted by the latter upon a mutual agreement that it shall be a discharge of the cause of the action. The agreement is the accord and the thing given or done is the satisfaction. Both parts are essential to the defence for accord without satisfaction or satisfaction without accord is no answer. An accord before breach is an agreement varying or discharging the previous contract, if validly made, is a good answer to a subsequent breach of the contract without performance or satisfaction. Bills of exchange and promissory notes may be discharged after they are due by mere waiver without satisfaction². Accord and satisfaction must be pleaded specifically. A substituted agreement may be accepted in accord and satisfaction of an existing cause of action, the new promise only and not the performance of it being taken in satisfaction and discharge. Accord must be executed and satisfied. Until satisfaction under accord, the original cause of action is not at all affected thereby. An accord and satisfaction made by a third party with the plaintiff, on the defendant's behalf, may be subsequently adopted by him and enure to his benefit³. Accord and satisfaction after breach is in general a good defence to an action on any contract whether made by parol or by specialt .

Composition with creditors is an instance of the general rule. When a composition is entered into between a debtor and his creditors, each creditor agrees to accept a smaller sum than is due in satisfaction of his debt, the consideration for each creditor's promise consists in every other creditor undertaking to forego

¹*Precedents of Pleading*, 3rd. ed., 1868., p. 480.

²*Foster v. Dawber*, 1851, 6 Ex. 839; *Finch S. C.*, 678.

³*Jones v. Broadhurst*, 9 C. B. 173, 193.

⁴Bullen and Leake, *Plea of Accord and Satisfaction*, pp. 479-483; *Replication to Plea of Accord and Satisfaction*, 483; Roscoe, *Nisi Prius*, 11th ed., 1907, pp. 659-661.

his part of the claim. *Good v. Cheeseman* decided that Consideration in a composition with creditors must be something other than mere acceptance of a smaller sum in satisfaction of a larger; it is the substitution of a new agreement with new parties and a new Consideration. Parke J. said: "Each creditor entered into a new agreement with the defendant (the debtor), the Consideration of which, to the creditor, was a forbearance by all the other creditors who were parties to insist upon their claims". Lord Tenterden said: "This was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in Consideration of their own mutual engagement of forbearance; the defendant at the same time promising to make over a part of his income and to execute a warrant of attorney which would have given the trustee an immediate right for their benefit. In fact, a new agreement is substituted for the original contract with the debtor; the Consideration to each creditor being the engagement of the others not to press their individual claims".

RULE VIII.—The Compromise of a Bona Fide Dispute is a Valuable Consideration.

*Wade v. Simon*² decided that the agreement to compromise was not binding because one of the parties to that compromise knew that he had no case. In *Callisher v. Bischoffsheim*³ *C* sued *B* for breach of a contract to deliver certain railway shares. *C* stated that some money was due to him from the Government of Honduras. *C* was to sue for the amount. In Consideration of forbearing to sue for a certain time *B* agreed to hand over to *C* certain railway shares. *B* stated in defence that at the time of the alleged agreement no money was due to *C* from the Government of Honduras. Held, *C* must succeed. Cockburn C. J. said: "A compromise is

¹1831, 2 B. and Ad. 328, 335 ²1879, L. R., 5 Q. B. 449.

³1846, 2 C. B. 548.

effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes that he has a fair chance of succeeding, he has a reasonable ground for suing, and his forbearance to sue will constitute a good Consideration. When such a person forbears to sue, he gives up what he believes to be a right of action and the other party gets an advantage, and instead of being annoyed with an action, he escapes the vexatious incident to it. It would be another matter if a person made a claim which he knew to be unfounded and by a compromise derived an advantage under it". If a person forbears or promises to forbear from exercising his legal right against another person, it will be no real Consideration from a promise by the other or any third party unless there was some *bona fide* legal right to be enforced. In *Jones v. Ashburnham*¹ Lord Ellenborough C. J. said: "It is a known rule of law that to make a promise obligatory, there must be some benefit to the party making it or some detriment to the party to whom it is made; otherwise it is considered a *nudum pactum* and cannot be enforced. How can the plaintiff show any damage to himself by forbearing to sue when there was no fund which could be the object of the suit? No right can exist in this vague, abstract and indefinite way. Right is a correlative term; there must be some object of right; otherwise there cannot be said to be any right. Has there been any suspension of the plaintiff's right? Unless a right is capable of being exercised, there can be no suspension of it." In *Miles v. New Zealand Alford Estate Co.*² Bowen L. J. held that "if an intending litigant *bona fide* forbears a right to litigate a question of law or of fact, it is not vexatious or frivolous to litigate, he does give up something of value". In *Holdsworth Urban District Council v. Rural District Council of Holdsworth*³ Warrington J. decided that it is no ground for setting aside a compromise that the claim, or

¹1804, 4 East, 455.

C. A.

²1885-86, 32 ch. D. 266, 289

³1907, 2 ch. 62, 72.

one of the claims, made by one of the parties was not well founded in law, provided that it was put forward *bona fide*. Cotton C. J. said such a forbearance is good Consideration for a promise, even though the claim is not well founded, if it is honestly believed in and the promisee does not conceal from the promisor any fact which he knows will affect its validity ¹.

For more than 200 years the opinion was that for- History.
bearance to prosecute an invalid claim was under all circumstances an incompetent Consideration. Forbearance, where there is no cause of action, cannot be any Consideration to raise an assumpsit. In *Stone v. Wythipol*² the promise of an executer in Consideration of debt contracted by his testator whilst he was an infant was held invalid. In Manning's case³ it was decided that a promise by an heir to whom no assets had descended to pay a debt of his ancestor is unenforceable where such promise is given for a forbearance to sue. In *Lloyd v. Lee*⁴ Tindal C. J. explained the principle on which these decisions rest. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another when he is conscious that he has no good cause of action. In order to constitute a binding promise the plaintiff must show a good Consideration, something beneficial to the defendant or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be if he had no cause of action and beneficial to the defendant it cannot be, for in contemplation of law the defendant upon such an admitted state of facts must be successful and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The Consideration therefore altogether fails. In *Longridge v. Dorville*⁵ it was decided that if an action is doubtful in law and fact and legal proceedings have been commenced upon it in good faith, a

¹Miles v. New Zealand Alford • ³1606, Cro. Eliz. 126.

Estate Co., 32 ch. D., pp. ⁴1717, Str. 94.

266, 284.

⁵1821, 5 B. and Ald. 117.

²1588, Cro. Eliz. 126.

promise given in Consideration of release of such proceedings is good. The same principle was applied in *Cook v. Wright*¹ where the plaintiff's *bona fide* believing the defendant to be liable to pay them certain expenses for which he was not, and believed himself not, to be liable, threatened him with legal proceedings and he by way of compromise gave promissory notes. Held there was sufficient Consideration for the notes.

Formerly when an action was brought upon a promise given for a forbearance to sue, the Court asked two questions: (1) Whether the parties had made that actual contract in dispute, and (2) whether that original cause of action was legally enforceable? The answer to these two questions deprived the plaintiff of the benefit of any compromise and adjustment. Now the making of the agreement eliminates all questions of merit of the previous claim if there is no fraud or *mala fides* and the claim is not clearly illegal. At the close of the reign of Queen Elizabeth the formative period of the Doctrine of Consideration had ended and the modern law of English Contract had been fully developed. The general forms of Consideration had appeared:—

(a) Detriment to promisee was necessary in order to give validity to unilateral promise. This is the original form of simple assumptial contract².

(b) The question of mutual promises as Consideration for each other. Langdell³ says that an attempt has been made to distinguish between unilateral and bilateral agreements. Pollock⁴ makes a similar distinction. Anson⁵ showed the fallacy of that distinction; it assumes that the second promise imposes an obligation upon the promisor.

These different kinds of Consideration cannot be resolved into one. No present detriment to the promisee

¹1861, 1 B. and S. 559.

²Langdell, *Summary of Contracts*, s. 64; Ames, *Two Theories of Consideration*, 12

• *Harv. L. R.*, 515.

³14 *Harv. L. R.*, pp. 496—508.

⁴*Contracts*, 1st ed., p. 158.

⁵*Contracts*, 1st ed., p. 80.

is found either in the Consideration of legal duty or in mutual promises. In the one case the detriment is past, having been incurred when the debt was created. In the other case there is a contemplated loss or detriment to both parties, *viz.*, future performance of the respective promises.

Forbearance to sue is a good Consideration although it cannot be any advantage to him who makes the promise. Where a compromise of a disputed right is effected before any suit is instituted, it is a good Consideration. All that the law requires is that there must be reasonable ground for the claim and that the claim be pressed in good faith. Where these two conditions concur a forbearance to institute a suit which is in contemplation constitutes good Consideration. Bullen and Leake¹ say, the promise to forbear and stay proceedings is denied by general issue non-assumpsit. If the debt or cause of action agreed to be forborne is set out in the declaration as a distinct averment, it must be, if intended to be denied, traversed in terms. The forbearance itself and the alleged breach if denied must be specially traversed. Where a claim is *bona fide* made, respecting which a reasonable doubt exists, forbearing to sue is a good Consideration, although no proceedings have been taken. Agreement to forbear for a time proceedings at law or in equity is a valid Consideration for a promise².

RULE IX—As a General Rule a Past Consideration will not support a Promise.

To this general rule there are certain exceptions in which a promise is held to be binding, although the Consideration for it is a benefit which was received by the promisor before the promise was made, *e.g.*—

A person who is protected from liability on his promise by a rule of Common Law or Statute intended for

Exception I

¹ *Pleadings*, pp. 157-158, 584n (a).

² *1 Roll. Abr.* 24 pl.33; Comyn, *Digest*, "Action Upon the

Case", "Upon Assumpsit", B 1; 3 Chitty, on *Pleading*, pp. 66, 67.

his benefit, may renounce that benefit and render himself liable by entering into a fresh contract although he receives no new Consideration for it.

In *Wennell Adney*¹ (1802) Lord Mansfield made current the doctrine that the existence of a previous moral obligation constituted such a relation between the parties as would support an express promise. In *Earle v. Oliver*² Parke B said: "Where the Consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the Statute or Common Law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it."

Exception
II.

Ratification of contract by an infant:—Formerly a contract made by an infant during minority could be ratified on attaining majority but by the *Infant's Relief Act, 1874*³, that is not allowed; if a negotiable instrument be given after attaining majority in respect of a loan during infancy, it is void even against a holder in due course⁴.

Exception
III.

If one person renders services to another at his request a subsequent promise to pay for the work is enforceable⁵.

These cases are no exception to the rule because there may be an implied promise to pay for the service, and the subsequent express promise may be treated as an admission which evidences a bargain fixing the reasonable remuneration for the service done. Erle C. J. explained⁶ *Lampleigh v. Braithwaite* from a modern point of view. "It was assumed," he says, "that the journeys which the plaintiff performed at the request of the defendant and other services he rendered would

¹ 3 Bos. and P. 247 Finch, *Selected Cases*, p. 338 note.

² 1848, 2 Exch. 71. p. 90.

³ 37 and 38, Vict c.. 62, s. 2.

⁴ Betting and Loans Act, 1892, 55 Vict. c. 4, s. 5.

⁵ *Lampleigh v. Braithwaite*, 1615, Hob. 105; 1 S. L. C. 141-172, 11th ed.; *Hunt v. Hunt*, 3 Dyer 272a.

⁶ In *Kennedy v. Brown*, 1863, 13 C. B. N. S. 677.

have been sufficient to make any promise binding if it had been connected therewith in one contract ; the peculiarity of the decision lies in connecting a subsequent promise with a prior Consideration after it had been executed. Probably at the present day such service on such a request would have raised a promise by implication to pay what it was worth." In *Wilkinson v. Oliveira*¹ the plaintiff at the defendant's request gave him a letter for the purpose of a law suit. The defendant proved his case by that letter. He subsequently promised the plaintiff to pay £100. Here the plaintiff evidently expected some return for the use of the letter and the defendant's request for it was an offer that if the plaintiff would give him that letter, he would pay a sum to be determined thereafter. These cases were at one time supposed to be decided on the ground of moral Consideration but it is no longer necessary to do so. If a pauper² resides in a parish other than the place of his legal settlement, the poor law authority of this latter place may be required to recoup to the poor law authority of the parish in which he resides the expense of medical attendance voluntarily incurred by them for the pauper when residing there. In *Watson v. Turner* it is stated that the defendants, being bound by law to provide for the poor of the parish, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper which it was the duty of the defendants to have provided ; that was the Consideration, and the subsequent promise by the defendants to pay for such assistance was evidence from which it might be inferred that the Consideration was performed by the plaintiff with the consent of the defendants and consequently was sufficient to support a general *indebitatus assumpsit* for work and labour performed for the defendants at their request³." In *Wing v. Mill*⁴ the pauper was residing out of his parish ; that parish acknowledged its

¹1835, 1 Bing, N. C. 490.

²*Watson v. Turner*, 1767,
Buller, *Nisi Prius*, 147.

³1 Selwyns, *Nisi Prius*, p. 5
ln. 11.

⁴1817 1 B. and Ald. 105.

liability for his maintenance by making a weekly allowance. During the illness of the pauper a doctor attended him. The overseer of the parish of settlement agreed to pay the bill of the doctor. Held, the overseer was liable. In *Paynter v. Williams*¹ the liability rested upon a request to provide the necessary attendance and a promise to pay for such attendance, both of which are to be implied from the conduct of the parties.

In order to support a promise, Consideration may be executory or executed but it must not be past. If Y's act benefits X, and in consequence X promises Y afterwards to give something, that promise is said to be made on a past Consideration. The distinction between executed and past Consideration is that in the former the promisor gets the benefit of the act by promising expressly or impliedly in return; in the latter, the promisor has already got the benefit of the act without promising in return, so in fact he gets nothing from the promisee in exchange for his promise, *e.g.*—

(a) X may have acquired a benefit from Y's act or forbearance and has also incurred a *legal obligation* to Y; afterwards in Consideration only of the transaction having taken place, X promises Y more than he is legally liable to perform. In *Roscorla v. Thomas*² A purchased a horse from Y who afterwards in Consideration of the previous sale promised that the horse was sound and free from vice. It was in fact a vicious horse. Court decided that the sale created no implied warranty or promise that the horse was not vicious; the promise was quite independent of the sale. It fell "within the general rule that a Consideration past and executed will support no other promise than such as would be implied by law³." Lord Denman C. J. said: "As a general rule promise must be co-extensive with Consideration. The precedent sale without a warranty though at the request of the defendant, imposes no other duty or obligation upon him".

¹1833 1 C. and M. 810.

²1842, 3 Q. B. 234.

³*Finch Cases on Contract*, p. 340-342.

(b) *X* may have obtained a benefit from *Y*'s act or forbearance without having incurred any legal liability to *Y* ; afterwards in Consideration only of having obtained the benefit, *X* makes a promise to *Y*. In *Eastwood v. Kenyon*¹ *K* contended that the promise was past and therefore void. *E* argued that as benefit was derived from the act of improvement of the estate, there was a moral duty to pay and that moral duty was quite sufficient Consideration. Held, that judgment must be given for the defendant because the past benefit was not given at the request of *K* and by the old Common Law of England such a benefit was no Consideration at all. Lord Denman said : " The doctrine would annihilate the necessity for any Consideration at all".

The rule that a past Consideration will not support Exceptions. a promise has three exceptions :—

(a) A past Consideration, if it be executed at the request of a promisor, will support a promise.

(b) A past Consideration will support a promise, if it consisted in a performance by the promisee of his part of a previous contract with the promisor ; such contract was either void at the time it was made (but would have been valid if it had been made at the date of the subsequent promise) or it has become unforceable owing to the Statute of Limitation when the subsequent promise was made.

(c) If the past Consideration consisted in the voluntary performance by the promisee of what the promisor was legally bound to do, it will support a promise.

(a) A past Consideration, if it be executed at the request of the promisor, will support a promise. Request may be made with or without intention of creating legal relations between the parties. A request may be accompanied by an offer to remunerate for the act or forbearance requested ; or it may be one from which a

Explanation
of Exceptions.

¹1840, 11 A. and E. 438.

reasonable man could infer such an offer. Such a request is an offer, and doing what is requested is an acceptance of the offer, so a legal liability results to give the reasonable remuneration. If the request fixes the amount of money to be given for the trouble, any subsequent express promise to pay more than the agreed sum is void¹. But if the amount is not fixed when the request is made, there is an implied promise to give reasonable compensation and a subsequent promise to give a certain amount may be regarded : (a) as an admission which evidences ; or (b) as a positive bargain which fixes the amount of the remuneration due. A request may not be intended to create any legal relations at all. There may be a request made without any idea of paying any money or it may be of such a nature that no reasonable man would infer that money was intended to be given. It follows that the request is not an offer, and if the other party complies with it, no legal liability can arise even though in complying with the request, there may be much trouble and expense and the other party may derive much profit from it. In such a case the one party has derived benefit from the act of the other without incurring any legal liability. Any subsequent express promise to give remuneration for the service rendered is a promise made upon a past Consideration executed at the request of the promisor, *e.g.* : If *X* requests *Y*, an old friend of his family, to do the best he can to obtain an appointment for *X*, *Y* exerts himself and succeeds in getting an appointment for *X*. *X* intimates to *Y* that in Consideration of the trouble which he had taken for his sake, he will give him £50. In order to give legal effect to the expressed intention of *X*, the judges have decided that the subsequent promise must be regarded as relating back to and forming part of the antecedent request and so a legal liability is created². It is stated that a mere voluntary courtesy is not sufficient to support a subsequent promise ; but when there was a previous request the courtesy was not merely voluntary

¹ *Roscorla v. Thomas* 1842, 3 ² 1 S. L. C. 136, 146.

Q. B. 234.

nor is the promise *nudum pactum*, but it couples itself with, and realates back to, the previous request. Chitty¹ says where the plaintiff's act is moved or procured by the request of the party who makes the promise, it will bind, for though the promise follows, yet it is not naked, but couples itself with the precedent request and the merits of the party procured by that suit. Leake² says: "A merely voluntary courtesy will not have a Consideration to uphold an assumpsit, but if that courtesy was moved by a suit or request of the party that gives the assumpsit, it will bind". In *Lampleigh v. Braitwaite*³ the facts were that *B* had caused the death of one Patrick and requested *L* to do all he could to obtain a pardon for him from the king. *L* took the trouble to ride and travel at his own expense from London to Roiston when the king was there, and to London and back and so to and from Newmarket. Afterwards, in Consideration of the trouble, *B* promised to pay him £100. *B* failed to pay the agreed sum; *L* sued him for the amount with damages. *B* contended: (a) that the Consideration was past; (b) that it did not appear that *L* had done anything towards obtaining the pardon except riding up and down, and nothing done when he came there. Held, judgment must be for *L* for the amount of £100.

The court agreed that a merely voluntary courtesy will not have Consideration to support an assumpsit, *i.e.*, if *L* had tried to obtain the pardon for *B* without any previous request, *B*'s subsequent promise to pay the sum would have been without Consideration. But if that courtesy were moved by a request of the party who gave the assumpsit it would bind, for though the promise followed, it was not naked, but related back to the request before, and the merits of the party were procured by that suit which makes the difference between the promise to pay for something already done at the promisor's request, and one to pay for something

¹ *Contracts* 16th ed., 1912, p.37. ³ 1614 Hobart 105; 1 S. L. C.

² *Contracts*, 1910, 6th ed. p., 30. 136.

already done without the promisor's request. The former is real Consideration, the latter is no Consideration because it is past. The Court decided that there was no Consideration for *B*'s promise and thus the first argument failed, and as *L* had not been requested to obtain the pardon but to do his endeavour to obtain it, he had done what he was requested to do by riding for that object; and the court upheld the second argument. The word 'courtesy' obviously meant something done for another without expectation of remuneration; if neither party to the promise intends to enter into legal relations with the other no legal liability can arise. But if the person who requests agrees to pay for it, then the promise couples itself with the request and with what was obtained by the request. Thus is recognised the exception to the rule that a past Consideration will not support a promise; but the fiction of the relation back reconciles it with the ordinary doctrine of Consideration. The promise expresses the intention of the promisor to pay for what he has obtained gratuitously. The legal fiction gets rid of the merely technical obstacle which prevents such promise from being legally binding. The court really treats the subsequent promise as expressing the real intention at the time of the request and so decides the case just as it would have done if both request and promise had preceded the act that constitutes the Consideration.

In *Wilkinson v. Oliviera*¹ the facts were that *O* had a claim against the estate of D. Oliviera, deceased. In order to establish his claim, it was necessary for him to prove that D. Oliviera at the time he made the will was an alien and a native subject of Portugal. Wilkinson had a letter written to him by D. Oliviera which would prove the point in dispute. *O* requested *W* to give him that letter to be used in evidence. *W* did so and the result was that *O* established his case to a large sum of money. In Consideration of what *W* had done,

¹1835 1 Bing, N. C. 490.

O promised to give him £1,000. *O* did not pay the sum. *W* sued him on the above facts for the agreed sum. *O* urged in defence: (1) that he had not established his case by means of that letter; (2) that the letter had been given to him by *W* by way of a spontaneous gift. Held, judgment must be given for the stated sum. Tindal C. J. said: "What would you say to the case of a man who entering a shop should say, I will give you £10 for such an article. The word 'give' is used on both sides. It is a gift upon a mutual Consideration. As the promise to give £1,000 was not made until long after the gift of the letter, it is only on the assumption that the request and promise were concurrent that the gift of the letter and the promise to pay can be described as 'mutual'." In *Bradford v. Roulston*¹ *B* had a ship for sale *R* introduced *X* and *Y* to *B* and *X* and *Y* bought the ship but had not enough money to pay for it *R* requested *B* to give them credit for the sum due and *B* did so. Subsequently *R* promised *B* in writing to guarantee payment of the sum by *X* and *Y*, and *B* brought an action on that guarantee. Held, *R* was liable on the guarantee. For although the Consideration was past, yet as it was given at *R*'s request, the principle of *Lampleigh v. Braithwaite* was applicable and the guarantee was legally binding.

Various views are held on the doctrine laid down in *Lampleigh v. Braithwaite* (1 S. L. C. 136.) At the present day the doctrine laid down in that case is regarded as doubtful. Pollock² says: "There is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only *evidence* of what the parties thought the service worth". Anson³ says: "The subsequent promise is only binding when the request, the Consideration and the promise form substantially one transaction so that the request is virtually the offer of a promise the precise extent of which is hereafter to be ascertained"

¹1858, 8. Tr. C. L. 468.

²*Contract*, p. 189.

³*Contracts*, 13th ed., 1912, p. 12.

Hare¹ says : " At an earlier time it was held that a past Consideration would not support an action of debt, but was enough for *assumpsit*²". Holmes³ says ! 'The theory was still that the breach of promise was an actionable wrong, because of an existing relation between the parties which created a special duty, not that an executory contract as such created an obligation.'" In *Stewart v. Casey*⁴ the facts were that *S* and *C* were the joint owners of certain patents and at their request introduced these patents into the market and expended money in advertisement. Subsequently *S* and *C* signed and handed to *C* a writing containing the following : " We now have pleasure in stating that in Consideration of your services as a practical manager in working our patents we hereby agree to give you a one-third share of the patents. *C* Considered this as an assignment to him of a third share in the patents and got it registered at the Patents Office. *S* died and his executor and surviving partner sued to have the name of *C* taken off the register because : (a) the document did not constitute an assignment ; and (b) it was not a valid agreement to assign because there was no Consideration for it. Held judgment must be given for *C* because the document was a good equitable assignment as there was real Consideration for it. Bowen L. J. in reply to the argument that the Consideration was past said: " That raises the old question of *Lampleigh v. Braithwaite*. I do not propose to discuss that question. But the answer to the objection raised is clear. Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. A past service raises an implied premise that at the time it was rendered, it was to be paid for ; and if that service was intended

¹ *Contracts*, 1887; pp. 246-49.

Worlington 1595, 2 Leon 224.

² *Marsh v. Rainsford* 1588,

³ *Common Law*, p. 286.

2 Leon 111; *Sidenham v.*

⁴ 1892, ch. I, 115.

to be paid for, the subsequent promise to pay may be treated either as an admission which evidences, or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered. In this case there is ample ground for the promise to give the third share". This case decides that if a request creates a legal liability, and there is a subsequent promise, that promise may create legal liability. It *does not decide* that if a request does not create a legal liability, and a subsequent promise is given, such a promise *can have no legal effect* at all. If *X* does something at *Y*'s request without the intention of creating any legal liability, and afterwards *Y* promises to pay him a certain sum, the modern opinion would make it quite impossible to give any effect to such a promise of *Y* because *X* can defeat that claim by the plea of 'past Consideration', but if the old opinion be accepted the Court can give legal effect to *X*'s promise as part of the original request—the subsequent promise is treated as *proof* of the prior intention; and it seems probable that the Court will act on the old opinion which satisfies the principle as well as justice.

(b) A past Consideration will support a promise if it consisted in a performance by the promisee of his part of a previous contract with the promisor.

The principle of this exception is that the Consideration was originally beneficial to the party promising, and if the provision of Statute or Common Law was intended to protect the interest of the party, he can renounce the benefit of that rule; and if he promises to pay the debt which he ought to pay as an honest man, he is bound to perform it. We have seen Lord Mansfield's view in *Lee v. Muggeridge*. Gibbs J. said: "Wherever there is an antecedent moral obligation and a subsequent promise to perform it, it is of sufficient validity for the plaintiff to be able to enforce it." In *Lee v. Muggeridge*¹

¹1813, 5 Taunt, 36

a married woman (who according to the old law could not contract) gave a bond for money advanced at her request to her son by a former husband. Afterwards when a widow, she promised that her executors should pay the principal and interest secured by the bond and it was held that the promise was binding. In *Flight v. Reed*¹ the defendant renewed the bills, the Consideration for the renewal being the past loan, and it was held by Pollock C. B. and Wilde B. (Martin B. dissenting) that judgment must be given for the defendant in the following terms: "There are many conjunctures in which a man may feel himself morally bound to pay money and promises to do so, which the law would not recognise as forming a good Consideration. But a loan of money is a different thing. The very name of a loan imports that it was the undertaking and intention of both parties that money should be repaid". The general doctrine, promulgated in Lord Mansfield's time, has been much criticised. It was stated very widely in *Lee v. Muggeridge* and in *Eastwood v. Kenyon*²; the Exchequer Chamber finally decided that a mere moral obligation, arising from past benefit and not conferred at the request of the defendant, is not a good Consideration.

(c) If the past Consideration consisted in the voluntary performance by the promisee of what the promisor was legally bound to do, it will support a promise. Chitty³ says: "Where the plaintiff voluntarily does that to which the defendant was *legally compellable*, and the defendant afterwards in Consideration thereof expressly promises, it will be a binding promise. This exception rests upon moral grounds arising out of special circumstances. In *Wing v. Mill*⁴ Lord Ellenborough C. J. said: "In this case both the legal and moral obligation obtain," and Bailey J. said: "The promise made after the death of the pauper is founded on a legal as well as a moral Consideration." In *Paynter v. Williams*⁵ the

¹1863, 1 H. and C. 703.

²1840, 11 A. and E. 450.

³*Contracts*, 16th ed. 1912, 38

⁴1817, 1 B. and Ad. 105.

⁵1833, 1 C. and M. 810.

facts were similar to those in *Wing v. Mill*, with the difference that no promise was made to pay the apothecary's bill. The parish of settlement was held liable to pay for the attendance of the doctor. Lord Lyndhurst C. B. said: "They (the overseers) knew of the pauper being there; and that in my opinion amounts to a request on the part of the officers that the pauper should not be removed and a promise that they will allow what is requisite. They know by the same letter of the plaintiff's attendance. This in my opinion was an acceptance of the plaintiff's services and created a legal liability." Bayley B. said: "The legal liability of the parish is not alone sufficient to enable the party to maintain the action without a retainer or adoption of the plaintiff on the part of the parish. The legal liability of the parish does not give anyone who chooses to attend a pauper and supply him with medicine a right to call on them for payment." The legal liability arose from their conduct after they knew. Moral service *in itself* does not give any right to call for payment; but if there is subsequent express promise to pay, it amounts to adoption of the past services and in this way the plaintiff could enforce payment for the service rendered. Pollock¹ writes respecting the authority for this exception: "Not only is it scanty in quantity, but the decisions so far as they did not proceed on the now exploded ground that moral obligation is sufficient Consideration, appear to rest on facts establishing an actual tacit contract independent of any subsequent promise." Anson² says: "It would seem then that the promise in the cases cited to support the rule, was either based upon a moral obligation, which since the decision in *Eastwood v. Kenyon* would be sufficient to support it, or was an acknowledgement of an existing liability arising from a contract which might be implied by the acts of the parties—a liability which as *Paynter v. Williams* shows did not need a subsequent promise to create it. . . . It is strange that an exception to the general rule as to past Consideration resting on such scanty and

¹ *Contract*, 190.

² *Contracts* p. 124.

unsatisfactory authority should still be regarded as law." Maule J. in *Elderton v. Emmens*¹ said: "An executed Consideration will sustain only such a promise as the law will imply. And this really means that the explicit promise in *Lampleigh v. Braithwaite* would only be void, if the law would have implied it anyhow from the words or conduct of the parties."

The reply to the critics is that: (a) *Paynter v. Williams*² supports the exception. The liability did not need a subsequent promise to create it. *P* recovered what *W* was *legally* bound to pay, but he did not recover what *W* was morally bound to pay because there was no subsequent promise. This decision is still good law. (b) *East v. Kenyon* decided that the wide and unqualified doctrine of moral obligation, as stated in *Lee v. Mugeridge*, was not law because Lord Denman said: "The doctrine would annihilate the necessity for any Consideration at all," it did not affect the qualified doctrine laid down by Lord Mansfield, by means of which reasonable exceptions to the Common Law doctrine of Consideration were established. (c) If *X* voluntarily does what *Y* is legally bound to do, and if *Y* promises to *X*, this is clearly within the qualified doctrine, and *Y*'s promise creates a legal liability; for *X*'s act was beneficial to *Y*. *Y* was *protected from liability* by some rule of Common Law in his favour that a man cannot impose a legal liability upon another by doing an act on his behalf without his authority; *Y* promises to pay which is only what an honest man ought to do, and is then bound to fulfil his promise.

Apparent
Exceptions.

A gratuitous promise to do something for another creates no obligation to perform unless made under seal. But if the promisor attempts to perform and through negligence causes injury to the promisee, liability to pay damages will arise. The action will be founded on negligence or misfeasance. It seems that the only case in which such a promise could be enforced as a

¹1847, 4C. B. p. 496.

²1833, 1 C. and M. 810.

contract is where possession is taken by the promisor of the property of the promisee; in this case the promisee suffers detriment by parting with the possession and it is sufficient Consideration for the promise to perform the service properly. In *Corbett v. Packington*¹ Bailey J. said: "The Count alleged that the defendant undertook in Consideration of the reward to be paid to take care of the pigs and to redeliver them to the plaintiff and the breach is that the defendant did not deliver them. This requires something to be done by the defendant beyond the Common Law duty. The obligation to redeliver arose out of the agreement alone." In *Coggs v. Bernard*² 'the declaration certainly contained the word "undertook," but no Consideration for the promise was shown, and the plaintiff was not guilty. There was only one count in the declaration and no question as to misjoinder could arise. But I think it was properly held to be a count in tort, Consideration being the essential ingredient in a count in contract not being stated. This count contains an undertaking and a Consideration sufficient to sustain the undertaking. It is clearly in assumpsit and is improperly joined with count in tort.' In the case of *Coggs v. Bernard* the plaintiff declared that the defendant Bernard *undertook* to remove several hogsheads of brandy from a certain cellar. In doing so, the defendant and his servants were negligent and as a result of that negligence the brandy was lost. Gould J. said: "It is a good declaration. The reason of the action is the particular trust reposed in the defendant to which he had concurred by his assumption and in executing which he has miscarried by his neglect." Lord Holt held that 'Neglect is a deceit to the bailor. For when the bailor entrusts the bailee upon his undertaking to be careful, he has practised a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. Breach of a trust undertaken voluntarily is a good ground of action. The

¹1827 6B. and C. 268.

²1704 2 Raymond 2909; 1 S. L. C. 11th ed. 173, 272.

owner's trusting him with goods is a sufficient Consideration to oblige him to a careful management." The case decided that if a man *undertakes* to carry goods safely, and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier and was to have nothing for the carriage. In *Elsee v. Galward*¹ *X* promised *Y* to build him a warehouse by a certain day, but failed to do so. *Y* sued *X* for breach of contract for not completing the work in the agreed time and also for having increased the cost of the building by having used new materials instead of old materials which he was told to use. The promise of *X* was without Consideration. The Court held on such a promise he could not be liable to complete the work within a given time. But he was liable for misfeasance because he had undertaken to do the work and by disobedience to the order had increased the cost of the warehouse. In *Wilkinson v. Coverdale*² *C* undertook gratuitously to effect an insurance of *W*'s house. This he did but on account of neglect of some formalities, *W* could not recover any money on the policy when the house was burnt down. The Court decided that *C* was liable to pay. A promise to contribute money to charity is a good example of the class of promises which though they may be laudable and morally binding are not contracts. A contract may create a binding obligation, if the subscriber authorises a certain expenditure which is incurred in reliance on his promise³.

RULE X.—Any promise given by an engaged couple, or by third persons in Consideration of the marriage taking place, is a valuable Consideration.

In *Shadwell v. Shadwell*⁴ the plaintiff had promised to marry *A*; his uncle promised him in writing that if he married *A*, he should receive £150 a year during the uncle's life. He married; the annuity fell into arrear; the uncle died and the executors of the deceased were

¹1793, 5 J. R. 143.

²1793, 1 Esp. 75.

³Re Hudson, Creed v.

Henderson, 1885, 54 L. J. ch. 811.

⁴1860, 9. C. B. N. S. 159.

sued. Erle C. J. and Keating J. held that the promise was an offer of a promise capable of becoming a contract when the marriage took place. Byles J. dissented, holding that the plaintiff in marrying *A* had done no more than he was legally bound to do. Pollock¹ says it is by no means easy to be sure whether the Court thought the Consideration was performance or promise or whether the performance was exactly the performance of an existing obligation. *Luders v. Anstey*² was decided by Lord Eldon on similar grounds.

But a post-nuptial promise or settlement will be regarded as voluntary if the Consideration absent is other than marriage. In the case of contracts to marry, the promise given by one to marry the other party is sufficient Consideration for the promise by the other. Mutual promises have been held valid since 1555³. In *Nichols v. Raynbred*⁴ the validity of mutual promises was disputed but was finally affirmed. *N* brought an assumpsit against *R* that in Consideration that *N* promised to deliver the defendant to his own use a cow, the defendant promised to deliver 50 shillings. Adjudged for the plaintiff in both Courts that the plaintiff need not aver delivery of the cow because it is a promise for a promise. The promises must be at the same instant or else they both will be *nuda pacta*⁵. Each of the promises must be binding on the face of it. A promise which is invalidated by the rule of general policy or special provision of positive law is no Consideration⁶. Langdell says a promise may be incapable of being sued on, and therefore incapable of being a Consideration for a counter promise. Pollock⁷ denies that there is any logical reason or any other reason than convenience for holding mutual promises to be good Consideration for one another. The only result of holding otherwise would

¹ *Contract*, p 196 note X.

² 1799, 4 Ves. 501.

³ *Pecke v. Redman Dyer* 113.

⁴ 1615 Hilary Term, Hobart, p. 88.

⁵ *Finch Cases on Contract* p. 336.

⁶ "Mutual promises as a Consideration for each other," 14 *Harv. L. R.* p. 496—508.

⁷ *Contract* p. 191.

have been to impose a "nominal executed Consideration such as delivery of a nut, a pin, or a farthing on the formation of contracts by mutual promises; this formality would have led to the revival of the custom of giving earnest".

In bilateral or mutual contract the Consideration does not consist in detriment. It is *commonly assumed* that bilateral contract or mutual promises are Consideration for each other in the sense in which the word Consideration is used in unilateral promise. But it is a mistake. The bilateral contract is based solely upon the consent, and when it is said that mutual promises are Consideration for each other, the word Consideration is used in a broad sense meaning cause, reason or equivalent. The promise and counter promise draw their vitality from one source, *viz.*, the consensus of the parties, and one promise is given in Consideration of the fact that the other promise is given. The use of the term Consideration is a necessity of language only and does not bear the technical meaning. Before the time of Lord Mansfield the Courts were of opinion that every promise or covenant was complete and independent. Langdell¹ deals with the history of this change. If there is a promise on either side and yet but one contract, the contract is bilateral; and if the making of a promise is the only thing given or done on either side, the contract is purely bilateral and neither promise has any other Consideration than the counter-promise. Before the action of assumpsit a mere promise was not a Consideration as it would not create a debt; and hence purely bilateral Contracts not under seal had no existence in English Law. But when it became established that any thing of value given or done by the promisee might be made the Consideration for a promise, the court began to recognise that making a binding promise was giving or doing something of value and hence that such promises were entitled to be admitted in to the category of sufficient Considera-

¹*Summary of Contracts*, ss 139—142.

tions¹. Hence bilateral contracts not under seal were recognised owing to the introduction of the action of *assumpsit*².

Rule XI— Some contracts under seal require valuable Consideration for their validity : and the remedy of specific performance cannot be granted without valuable Consideration being given.

A contract in restraint of trade to be enforceable must have valuable Consideration for it even though it be under seal. This rule forms an exception to the rule that a speciality contract requires no Consideration. In *Mitchell v. Renyolds*³ it was settled that "reasonable" between parties meant: (1) that the party restrained had obtained sufficient and adequate Consideration for his promise; (2) that the restraint was not more extensive than was necessary to protect the interest of the other party; (3) that the restraint was particular (limited to a particular place) and not general, extending to the whole kingdom. A bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable Consideration, is good. Parker C. J. thus delivered the resolution of the Court whether the bond being in restraint of trade was good : "We all are of opinion that a special Consideration being set forth in the condition which shows it was reasonable for the parties to enter into it, the same is good and that the true distinction of this case is not between promises and bonds but between contracts with and without Consideration". Where the restraint was general, not to exercise a trade throughout the kingdom, it was thought that it must be bad as a matter of law⁴.

It is interesting to trace the chief differences between *Mitchell v. Reynolds*⁵ and *Maxim Nordenfelt Co. v.*

¹*Strangborough v. Warner on Contract*, p 199.
 1588, 4 Leon. 3; *Gower v.* ³1711, IP. Wms. 181, 1 S.L.
Capper 1597. Cro. Eliz. 543; C. 406.
Langdell's Cases on Contracts, ⁴1 S. L. C. 391., 397.
 Part I, p. 395. (1879). ⁵Decided in 1711, 1 S. L. C.
²*Baily v. Croft* 1812, 4 406.
Taunton 611; *Langdell, Cases*

Nordenfelt¹ with reference to : (a) Consideration, (b) particular and general restraint.

(a) Consideration is *one of the tests* of a contract being reasonable between the parties, it is essential even when the contract is under seal ; if there is no seal, the deed is void on the ground of unlawfulness. Once it was considered that adequacy of Consideration was quite necessary, but it was finally decided that it must be real also. In *Pilkington v. Scott*² *P* entered into a written agreement with *L* that *L* would serve for seven years and would not work with any one else without the licence of *P* ; during depression of trade, he would receive a moiety of his wages and the employer could terminate the contract within seven years by giving a month's notice or wages for one month. During this period *L* employed *S* without the sanction of *P*. *P* sued *S* in tort for wrongfully harbouring his servant. *S* contended that the contract of service between *P* and *L* was void because : (a) it was not mutual, *L* was bound to serve but *P* was not bound to employ him for seven years ; (b) it was a contract in restraint of trade and there was no adequate Consideration. Held, plaintiff must succeed because, subject to the power of dismissal, *P* was bound to employ *L* ; so there was a valuable Consideration for *L*'s promise; and it was reasonable restraint and Consideration was present. Alderson B. said : " If it be an unreasonable restraint of trade, it is void altogether ; but if not, it is lawful, the only question being whether there is a Consideration to support it and the Court will not inquire into the adequacy of the Consideration". Before *Hitchcock v. Coper*³ the idea prevailed that the Consideration must be adequate to the restraint ; that was to make the bargain instead of leaving the parties to make it.

Deed

A deed in English Law is a written instrument : (1) on parchment or paper expressing the intention or consent of a person or body of persons to confirm or concur in some assurance of interest in property or some other

¹Decided in 1894, A C. 549.

³1837, 6 A. and E. 438

²1864, 15 M. and W. 657

right ; (2) it is sealed with the seal of the party so expressing such intention or consent ; and (3) delivered as that party's act and deed to the person who is intended to be bound by it.¹ The effect is conclusively to bind the party by the intention or consent expressed in that writing. The person is estoppel from averring that it was not his intention to be bound.² In *Howatson v. Webb*³ it was held by Warrington J. that a plea of *non est factum* cannot be proved by showing misrepresentation as to contents of the deed, if the party executing it knew that the document related to the property intended to be dealt with. The misrepresentation was about the contents of the deed which the defendant knew related to that property. The plea of *non est factum* was, therefore of no avail. *Foster v. Mackinnon*⁴ was distinguished and the *National Provincial Bank of England v. Jackson*⁵ was followed. In *Thoroughgood's case*⁶ Byles J. said: " The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived not merely as to the legal effect but as to the actual contents of the instrument ". The plea to succeed must show that there was misrepresentation as to the character and class of the deed and not merely as to the contents of it⁷. In *Whitaker v. Palmer*⁸ Cozens-Hardy delivered the judgment which was confirmed. The effect of the deed was explained by saying that a deed imports a Consideration owing to its solemnity and this rule has been elevated into

¹Coke's *v Littleton*, 35b, 171b; A *Commentary on the Tenures of Littleton*; written prior to the publication of Coke upon *Littleton*; ed. from a copy in the Harleian collection of Mss, by Henry Cary, 1829; Shep. *Tauckstone* 50, 51; 2 Blackstone, *Com*, 295—341.

²*Littleton's Tenure*, new ed. by Tomkins 1841 s. 58, note

(d); 1 Plow. 308.

³1907, ch. I. 537.

⁴1869, L. R. 4 C. P. 704.

⁵1886, ch. 33, D. I.

⁶1584, 2 Co. Rep. 9.

⁷*Fitzherbert's Abridgement* tit. Barre 371, Folio 113; *Chitty on Pleadings*, 7th ed., Vol. I., pp. 10—12; *Comyn's Dig Pleader*, 2 W. 18.

⁸1901, 1 ch. 9 (C. A.).

rule of law¹. But the truth is that the binding effect of a deed is due to the rule of early English Law which attached great importance to writing as a mode of proof of the intention of a party. In the Middle Ages writing was confined to a few. In modern times writing is general and constantly used in mercantile transactions. Parol agreements are binding if Consideration is shown, and unsealed documents are used in evidence to prove oral agreements. The doctrine of Consideration was known long after sealed writings were in use².

A seal must be affixed in order to constitute a deed and the party professing to be bound by it must do some act acknowledging the seal to be his³. The seal need not be of any particular kind so long as it is affixed or impressed on the deed ; it may be affixed on the deed by a ribbon⁴. The modern practice is for the party to place his finger or thumb on the seal and at the time to utter the words " I deliver this as my act and deed " ; it is regarded as equivalent to delivery⁵. Signing is not essential but delivery must be made.

B.—THE DOCTRINE OF CONSIDERATION AS IT AFFECTS THE LAW OF PROPERTY AND CONVEYANCING.

RULE I.—The Presence or Absence of Consideration Changes the Legal Character of the Transaction.

Gifts.

There are three modes by which a gift can be made : (a) by deed ; (b) by delivery in cases where the subject of the gift admits of delivery, and (c) by declaration of trust.

¹1 Plowden 308 ; Bacon's *Reading upon the Statute of Uses* ; Fonblanque, 1 *Treatise on Equity* 342 n.

²Bigelow, *Placita Anglo-Normannica* 175, 177 ; Glanville X. 12 ; Bracton f. 100 ; Fleta, lib. II. c. 56, s. 20 ; Holmes, *Common Law*, p. 272, Pand M ; 2 *History of Eng.*

Law, pp. 217—223.

³Co. Litt. 6 a ; Perkin's *Profitable Book*, 129, 130 Touch, 56, 57.

⁴Shep. Touch, 57 ; Preston *Abstracts of Title*, 2nd ed., vol.III., p. 61.

⁵Williams, *Real Property* 13th ed., p.p. 150.

No particular form is necessary for a gift of land by deed. It can be made by an indenture made between the donor and donee or by deed poll under the hand and seal of the donor¹. It is not necessary to have an attesting witness for the execution of the deed except in the case of alienation of registered land or gifts under statutes which require attestation of the execution by the donor². For the forms of deeds of gift of chattels see the *Encyclopaedia of Forms and Precedents*³. Gifts of chattels are more frequently made by delivery of possession than by deed. A verbal gift of chattels without delivery of possession does not pass any property to the donee and is not a gift at all⁴. In *Cochrane v. Moore*⁵ Lord Esher M. R. said: "If the gift does not take effect by delivery of immediate possession it is not then properly a gift but a contract". Actual delivery is not a mere evidence of the gift but is part of the gift itself. Giving and taking are the two contemporaneous and reciprocal acts which constitute a gift. They are the essential element to make a gift valid⁶.

If a donor declares a trust for another, although no Declaration of Trust. Consideration is given by that other it binds the creator of the trust and affects the property. In *New Prince and Garrard's trustee v. Hunting*⁷ it was declared that it is immaterial whether the author of the trust has communicated that trust to the donee or not. If the settler retains control over the property, it must not be such control as is inconsistent with the intention to create a trust. A trust may be created without using any words importing confidence⁸. If the intending

¹Real Property Act, 1875, 38 and 39, Vict. c. 87, ss. 50, 53, 57, 58; Land Transfer Act, 1897, 60 and 61, Vict. c. 65.

²e.g. Mortmain and Charitable Uses Act, 1883, 51 and 52, Vict. C. 42 s. 4 (6); Merchant Shipping Act, 1894, 57 and 58 Vict. C. 60.

³Vol. VI. p. 129.

⁴*Shower v. Pilck* 1849, 4

Exch. 478.

⁵1890, 25 Q. B. D, 57, 76, C. A.

⁶2 Blackstone Com. ch. VIII., pp. 124—138, 441; Lewin, *Law of Trusts*, 12th ed., 1911, p. 53.

⁷1897, 2 Q. B. 19 (C. A.).

⁸*Page v. Cox* 1852. 10 Hare 162.

donor has not declared himself a trustee for the person whom he wishes to benefit, equity will not assist in completing the imperfect gift by holding that the donor is a trustee for the donee¹. If there is a voluntary covenant to surrender copyholds, though contained in a deed in which freeholds are effectually conveyed, it will not be enforced in the absence of words of trust². The declaration of trust of hereditaments must be in writing signed by the person who can by law declare the trust³. The Courts will carefully examine acts which are either contemporaneous with or subsequent to the alleged declaration of trust and will form its own opinion whether there is sufficient declaration or not.

A trust may be created for valuable Consideration or gratuitously ; once it is validly created, it can neither be revoked nor altered by its creator, unless there has been reserved expressly a power of revocation⁴.

The owner of the property may : (a) declare himself a trustee of that property for another ; or (b) transfer that property to a trustee in trust for a third person⁵.

The maxim *ex nudo pacto non oritur action* is recognised both at law and in equity. In *Jeffreys v. Jeffreys*⁶ a father by voluntary deed conveyed freeholds and covenanted to surrender certain copyholds to trustees in trust for his daughters ; he devised afterwards the same freehold and copyhold estates to his widow so that the will was complete both as to freehold and copyhold lands, while the deed regarded as an *assurance* was complete as to freeholds but incomplete as to copyholds. The daughters sued after the death of the father to recover the estates. Held, the title as to freeholds was complete but the title to copyhold land was incomplete and the

¹*Ellison v. Ellison*, 1802 Ves. 656. 1 W. & T, L. C., Vol. II, p. 853.

²*Jeffreys v. Jeffreys* 1841, Cr. and Ph. 138.

³Statute of Frauds 29 Car. 2 c. 3 s. 7.

⁴*Re Way's Trusts*, 1864, 2 De J. and S. 365.

⁵*Milroy v. Lord*, 1862, 4 De F. and J, 264, 274.

⁶1841 Cr. and Ph. 138.

Court could not execute a voluntary contract, because any imperfect voluntary conveyance in equity is regarded as a contract to convey. Such a contract will be binding as imperfect conveyance if a valuable Consideration has been paid, but it will not be binding as an imperfect conveyance if no valuable Consideration has been given. But if Consideration has been paid the Court will enforce even an imperfect conveyance. If a voluntary conveyance is perfected, it will be binding. In *Ellison v. Ellison*¹ Lord Eldon said: "If you want the assistance of the Court to constitute you *cestui que* trust and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que* trust.....But if the party has completely transferred his stock, etc., though the deed is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court". A trust is said to be completely constituted, if the settlor has done everything which according to the nature of the property comprised in the instrument is necessary to be done in order to transfer the property and to render the instrument binding upon him². This is done:

(a) where the donor is both legal and equitable owner—

(1) By actually conveying the property to the donee or trustee for him³, or

(2) By donor's declaration of trust for the donee⁴.

(b) Where the donor is equitable owner only—

(1) By giving a direction to trustee to hold on trust for the donee. In the case of realty this direction must be in writing⁵, or

(2) By conveying the equitable interest by a deed⁶.

¹ 6 Ves. 656; 2 W. and T. 8th ed., 1912, pp. 853, 857, 858. and T. 853. ⁴ *Ex Parte Pye*, 18 Ves. 140 8th ed., 1912, 2 W. T. 369.

² *Milroy v. Lord* 4 De G. F. and J. 264 Per Turner. L. J. ⁵ Statute of Frauds. s. 7. ⁶ *Kakevick v. Manning*, 1

³ *Ellison v. Ellison*, 2 W. De G. M. and G. 176.

If the voluntary trust is in favour of charities or arises under a will, it will be enforced, although it be executory.

Persons who
are within
Considera-
tion of
Contract or
Trust.

When the Court is asked to grant the remedy of specific performance or injunction, it will refuse its aid in certain cases :—

I. If *X* enters into contract with *Y* for a valuable Consideration to do several things, some of which are for the benefit of *Z*, *Y* can enforce that contract against *X* though *Z* will derive benefit¹; but *Z* cannot claim the specific performance of that contract from *X*².

II. But if *Y* enters into contract for *Z* as a trustee, or afterwards declares himself a trustee for *Z* of the benefit of that contract, *Z* can enforce it if *Y* refuses although the whole Consideration has moved from *Y*. In *Colyear v. Countess of Mulgrave*³ Lord Langdale said: "When two persons for valuable Consideration between themselves covenant to do some act for the benefit of a stranger, that stranger has no right to enforce the covenant against the two, although each one might as against the other". But Courts have decided from early times that *X* might enter into the contract as trustee of *Z*; and if *X* has entered into contract for *Z* as a trustee, *Z*, although he is a stranger to the contract and Consideration, has all the rights which *cestui que* trust had against his trustee⁴. In *Gandy v. Gandy*⁵ Cotton L. J. said: "If a contract, though in form it is with *A*, is intended to secure a benefit to *B*, so that *B* is entitled to say he has a beneficial right as *cestui que* trust under that contract, then *B* would in a Court of equity be allowed to insist upon and enforce the contract".

¹*Davenport v. Bishop*, 1846,
2 Y. and C, cc. 451.

²*Bellingham v. Lowther*
1674, ch. 1, Ca. 243.

³1836, 2 Keen, p. 81.

⁴*Tomlinson v. Gill* 1756, 1
Amb. 330; *Lloyds v. Harper*
1880, 16 ch. D. 290.

⁵1885, 30 ch. D. 66.

The issue of marriage are considered both at law and in equity as within marriage Consideration. If a contract is made in Consideration of marriage, the children or remoter issue of the marriage may enforce its provisions¹. The Court of equity enlarged the class of persons who came within the marriage settlement in order to uphold several transactions impeached under 27 Eliz., c. 4. The Consideration of marriage ran through and protected all the limitations of the settlement².

Underhill³ sums up the law on the point as follows :—

(1) The Court will enforce a voluntary trust against the settlor or his representatives if (a) it is created by will; or (b) the settlor has done all in his power to transfer the trust property to a trustee or has constituted himself a trustee for the purposes of the trust.

(2) An instrument intended to operate as an assignment but invalid as such (*a fortiori* a voluntary covenant) will not be construed as equivalent to a *declaration of trust* by the settlor in favour of the intended assignee or the covenantee⁴.

Where valuable Consideration has been given for an *incomplete* trust, it will only be enforced at the suit of some person privy to that Consideration, and if enforced at all, it will be enforced in favour of all beneficiaries not merely the plaintiff⁵.

If Consideration fails, the trust becomes revocable. The Court will cancel a trust at the suit of settlor or his representatives if the object of the trust has failed. The Court will rectify or cancel a settlement if it were executed in ignorance or mistake or fraud or undue

¹Green v. Paterson, 1886 32. ch. D. 95.

²Jenkins v. Keymey, 1669, 1 Cal. Ca. 103.

³Underhill on *Trusts*, 9th ed., 1911, Art. 8 (1), (2), p. 35.

⁴Milroy v. Lord, 4, De G. and J. 264.

⁵Underhill, pp. 35—38, *Ex Parte Pye* 18 Ves. 140; 2 W. and T. L. Cases 369. *Harding v. Harding* 17 Q. B. D. 442.

influence, provided the settlor does not acquiesce after the influence has ceased and full knowledge is acquired¹.

Distinction
between
Illegal Con-
sideration
and Illegal
Trust.

Although there may be nothing illegal in the trust itself, the Consideration for which the property was transferred may be illegal, *e.g.*, if a settlor transfers property to a trustee in trust for Z and the Consideration of the transfer is an illegal object, the settlor can recover the property from the trustee. The settlor cannot show his own turpitude in an action against the trustee.

Considera-
tion in Con-
veyancing.

When a conveyance was made without any valuable Consideration, it was declared that the intention was not to benefit the donee, but to create a use in favour of the donor. The doctrine of the Court of equity was that the donee should hold not for his own benefit but for the use of the donor. The use is said to come back to the donor².

So long as Consideration is expressed, the amount is immaterial. If no proper evidence was given, the beneficial interest would result to the donor. The practice of inserting Consideration, Gilbert says, was common about the time of the Wars of the Roses, so that the use of the country to deliver lands to be safely kept has made the mere delivery of possession no evidence of right without valuable Consideration³. This does not apply to the case of a grant for life or years. Uses were created by transfer of possession or by covenant to stand seised.

The Statute of Uses⁴ produced strange results. That statute failed in its object because secret conveyances of legal estate were created and the distinction between legal and equitable estates was revived. Conveyance operated by transfer of possession; it took the estate out of the donor and vested it in the donee. If a use were raised without transferring possession by

¹ *Allcard v. Skinner*, 1887,
36 ch. D. p. 145.

² Sugden's *Gilbert on Uses*,
ch. I, s. 5, 1; s. 6, p. 117.

³ *Ibid.* p. 125.

27 Hen VIII, 1535-1536,

A. D., c. 10.

express words or implied conduct, the donee was bound to hold to the use of the donor or some third party or of donor and a third person¹.

Where a person purchases property in another person's name, the presumption arises that the intention was to have that property in trust for himself. In *Dyer v. Dyer*² Eyre C. B. said: "The clear result of all the cases without a single exception is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several whether jointly or successively, results to the man who advanced the purchase money". This rule applies; to pure personality also³. Parol evidence is always allowed to show the actual purchaser notwithstanding the Statute of Frauds, for it is a trust resulting by operation of law and the parol evidence is to prove that the ostensible purchaser is an agent for the genuine purchaser. Resulting trust will not be admitted if any rule of law will be infringed thereby. Evidence may be given to *rebut a resulting trust* by showing that the nominal purchaser was intended to take the whole beneficial interest.

RULE II.—Conveyance though valid as against the Transferor may be set aside by other Persons for want of Valuable Consideration.

Creditors can impeach conveyances. 13 Eliz C. 5 enacts that the alienation of any property made with the intention of delaying, hindering or defrauding creditors shall be void as against them⁴. If a purchaser has made a *bona fide* bargain with the seller for value without knowledge of any fraud he will prevail against the claims of creditors although the grantor had fraudu-

¹ Elphinstone's *Introduction to Conveyancing*, 6th ed., 1906, pp. 73—78.

² *Fowkes v. Pascol*, 1875, 10 ch. 343.

Freeman v. Pope 1870, 5

³ 1788, 2 Cox, 92; 2 W. and T. pp. 820-821.

ch. App. 538 *Spirret v. Willows* 34 L. J. ch. 367.

lent intention. The transaction will be avoided only for the benefit of creditors and to the extent of their claim ; otherwise it is binding between the immediate parties. *The Ideal Bedding Co., Ltd. v. Holland*¹ decided that if a person makes a voluntary disposition of his property which can be taken in execution and the disposition is likely to cause delay, actually causes delay or defeats his existing creditors at the time, or subsequent creditors who stand in their shoes, the disposition will be declared fraudulent against all such creditors.

The *property* intended to fall within the scope of this Statute must be such as can be taken by way of execution, because a creditor cannot be deemed to have been delayed, hindered or defrauded by means of the alienation of property which cannot be attached. The statute applies to lands, tenements, hereditaments, goods and chattels, or any lease, rent, common or other profit or charge out of the same, and also alienations of copyholds, equitable reversionary interests, policies of assurance, other choses in action, and good-will of businesses². If property belonging to the husband is deposited in the name of his wife in order to defraud creditors, it will be available for the debts of the husband notwithstanding the provisions of the Married Women's Property Act, 1882. The Statute extends to every form of alienation by means of which creditors may be delayed, hindered or defrauded. The exercises of a general power of appointment falls within the statute but the exercise of special power of appointment does not ; but if the donee of the power is entitled, in default of appointment, creditors can claim that property under the statute ; voluntary separation-deeds, marriage settlement with intention to defraud, and apparent purchases in the name of children of third parties will be set aside³. A deed, though apparently in the form of a trust to benefit creditors, yet may be a cloak for retaining benefit for the debtor himself. If such a

¹1907, 2 ch 157.

²13 Eliz ch. 5 s. 1.

³*Partridge v. Gopp* 1758, Amb. 596.

trust-deed imposes any extra burden on the creditors, it can be set aside by those creditors who have never consented.

The Statute protects *bona fide purchasers for value*. The creditors must show that the grantor had a fraudulent intention and that good Consideration was not given for the alienation. The Consideration must be actually paid, mere security or agreement to pay is not enough¹. Good Consideration in the statutes of Elizabeth means *valuable pecuniary Consideration*². Valuable Consideration is a thing of pecuniary value given or suffered by the purchaser. The *mere inadequacy of value* is not in itself an objection, though it may lead to suspicion of notice³. In purchases the question is not whether the Consideration is adequate but whether it is valuable⁴. *Thompson v. Webster*⁵ decided that the intention to defeat, hinder, or delay may be actual or it may be inferred. The creditor can show that the settlor was indebted to the extent of insolvency or that he was largely indebted at the time of making the settlement and soon after he became insolvent⁶.

Marriage is sufficient Consideration May⁷ says : "Even the Consideration of marriage, though the highest known to our law will not support a conveyance without *bona fides*". *Campion v. Cotton*⁸ decided that the paraphernalia of the wife will be liable for the debts of the husband. It does not matter if the wife knew of the husband being indebted at the time but

¹*Hardington v. Nichols*, 1745, 3 Atk, 304.

²*Upton v. Basset* 1595, Cro. Elis. 444, Twydes' Case 1602, 3 Co. Rep. c. 80b, p. 1 I. S. L. C. I.

³*Basset v. Nosworthy* 1673, Ca. Temp. Finch, 102; 8th ed. 2 W. and T. 163.

⁴Bigelow, on *Fraud*, 1890 Vol. 11, pp. 535—63 ; May

on *the Law of Fraudulent and Voluntary Conveyance*, 3rd. ed. 1908 p. 64.

⁵1859, 4 De. G. and J. 600 C. A.

⁶*Spirrett v. Willows*, 34 L. J. ch. 933.65, p. 123.

⁷*Fraudulent Conveyances*, pp. 64, 66.

⁸1810, 17 Ves. 263.

the wife must not be aware of any act of bankruptcy of the husband before settlement was made¹. If the marriage was restored to as a cloak to defeat the rights of creditors, antenuptial settlement will be set aside². A postnuptial settlement between husband and wife is for value if there is a bargain that either one or the other should give up something; and it has been settled that if husband and wife, *each of them having interests* no matter how much, or of what degree or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable Consideration and consequently is not void against a subsequent purchaser or mortgagee³. *Smith v. Cherrill* decided that a voluntary settlement will be void as against creditors to the extent only to which it may be necessary to deal with the estate for their satisfaction. To every other purpose it is good⁵. *Nairne v. Prowse* decided that marriage is a sufficient Consideration for an antenuptial settlement upon the husband, wife and issue of the marriage. If a postnuptial settlement be executed in pursuance of antenuptial agreements of which specific performance will be granted, it is deemed for valuable Consideration; and is not affected by the statute of 13 Eliz. c. 5 unless there was fraudulent intention on the part of the spouses. Where a parol contract was made in Consideration of marriage, the subsequent marriage will not be an act of part-performance so as to take the case out of the Statute of Frauds because the Statute expressly provides that a contract in Consideration of marriage shall not be binding unless it be in writing⁷.

¹In *Re Reis. Ex parte* 37 ch., D. 32.
Clough 1904, 2 K.B. 769 Per
Cozens-Hardy L. J. ⁴1867, L. R. 4 Eq. 390.

²*Colombine v. Penhall* 1853. *ances*, pp. 268, 272, 273.
Sm. and G. 228; *May*, ⁶1802, 6 ves. 752.
Fraudulent Conveyances, 65.

³*Ire Cameron and Wells*, ⁷*Warden v. Jones* 1872, 2
 De. G. and J. 76.

The object of separation deeds is to settle property in consideration of no proceedings being taken against the grantor for divorce. In *re Pope*¹; the meaning of the word purchaser for value was discussed. In *Fitzer v. Fitzer*² it was decided that the Courts 'will not weigh in golden scales the extent of the quantum and value' of Consideration and held that a small and inadequate Consideration is sufficient to support a settlement, unless the inadequacy may be such as to suggest want of good faith. Lord Westbury³, L. J., said: "It is true that there is an equity which can be founded upon gross inadequacy of Consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party did not understand what he was about or was the victim of some imposition." Pinnell's case⁴ decided that if there be *any* Consideration, the Court will not weigh the extent of it⁵.

If the property is transferred by the grantee for value, the purchaser will be protected if he has no knowledge of the fraud⁶.

Statute 27 Eliz., c. 4, enacted that all conveyances of lands or other hereditaments are void as against subsequent purchasers for valuable Consideration of any interest in the same lands or other hereditaments if made for the purpose of defrauding subsequent purchasers. The Statute 27 Eliz., c. 4, s. 1, was made perpetual by Statute 39 Eliz., c. 18. Upton and Bassett's case⁷ decided that if a man makes a lease for years by fraud and covin and afterwards makes another lease *bona fide*, but without fine or rent reserved, that second lease shall not avoid the first lease. This case seems to have extended the

Purchasers
can impeach
Conveyances.

¹ 1908, 2 K.B. 169, A.C.

p. 12.

² 742, 2 Atk. 511.

⁶ *George v. Milbanke* 1803, 9,

³ *Tennent v. Tennents*, L.

ves. 190.

R. 2 H. L. Sc p. 6.

⁷ 1595, Cro. Eliz. 445, 1 S.

⁴ *Coke* 117a.

L. C. 8.

⁵ *Addison, Contracts*, 11th ed.,

provisions of the Common Law against fraud. It was said by Yelverston J. (p. 445) that at the Common Law there was not any fraud remedied which should defeat an after purchase, but that only which was committed to defraud a former interest. But in *Cadogan v. Kennett*¹ Lord Mansfield declared that the Common Law would have attained the same results as those provided by Statute 27 Eliz., c. 4, without any statutory legislation. If a power of revocation to the grantor is reserved and that power is not exercised before the conveyance to such purchaser, the transaction will be valid. The statute expressly exempts conveyances made *bona fide* and for Consideration. The Voluntary Conveyances Act, 1893, enacts that no voluntary conveyance shall be deemed fraudulent and void within the meaning of 27 Eliz., c. 4, if made *bona fide* and without actual fraudulent intent.

Summary.

Effects of these statutes on the conveyances of property summed up.

(a) If a conveyance is made with real intention to defraud purchasers, it is void against all of them.

(b) If the property is granted with power of revocation reserved in the grantor, the grant will not be effective against a subsequent purchaser, though the grantor has not actually exercised that power.

(c) A subsequent purchaser for value whose title dates after 29th June, 1893, when the Voluntary Conveyance Act came into operation, or a purchaser claiming through him, cannot get any preference over a precedent voluntary grant if such grant was made in good faith and without any intention to defraud.

In order to succeed against a subsequent purchaser, some valuable consideration must be given. The amount of consideration may be very small; it need not be proportionate to the value of the property;

¹ 1776, 2 Cowp. 432.

it is not absolutely necessary of the instrument to suffice if it be shown from the terms. But the Consideration must be technical¹. A small remove a *bona fide* voluntary settlements *Eliz. c. 4.*

The Bills of Sale Act 42 Vict. c. 31: 45 and 46 protect the general credit (1882) the grantor himself are exempted from its settlements are not excluded that bills of sale of personal possession of the grantor unless they be registered making of them.

The Bills of Sale Act, bill of sale to which the or given in Consideration void.

A Bill of Sale is a writing whereby one person property he has in good ment given with respect in cases where possession

Bills of sale can be by a trustee in bankruptcy

The object of these being given to people possession of goods

¹ Re Ridler, Ridler & Co. 22 Ch. D. 74.

² Reed's Bills of Sale 12th ed. p. 174; Balm...

it is not absolutely necessary to set out on the face of the instrument the Consideration paid; it will suffice if it be shown by evidence or can be inferred from the terms. But under the Bankruptcy Act, 1883, the Consideration must be substantial, and not merely technical¹. A small Consideration will suffice to remove a *bona fide* settlement from the category of voluntary settlements for the purposes of Statute 27 Eliz. c. 4.

The Bills of Sale Acts 1878 and 1882 (41 and 42 Vict. c. 31: 45 and 46 Vict. c. 43) are intended to protect the general creditors of the grantor and (since 1882) the grantor himself. Ante-nuptial settlements are exempted from its operation; but post nuptial settlements are not exempted. These two Acts enact that bills of sale of personal property remaining in the possession of the grantor will be deemed fraudulent unless they be registered within seven days from the making of them.

The Bills of Sale Act, 1882, s.12, enacts that every bill of sale to which the Act of 1882 applies, if made or given in Consideration of a less sum than £30, is void.

A Bill of Sale is described as an instrument in writing whereby one person transfers to another the property he has in goods and chattels,³ or as a document given with respect to the transfer of chattels used in cases where possession is not intended to be given.

Bills of sale can be avoided against third parties by a trustee in bankruptcy and execution creditors.

The object of these acts is to prevent false credit being given to people who are allowed to remain in possession of goods which really belong to others

¹Re Ridler, *Ridler v. Ridler* *Law of Bankruptcy and Bills of Sale*, 9th ed. 1904, p. 427.
22 ch. D. 74.

²Reed's *Bills of Sale Acts*, ³*Allsopp v. Day*, 1861, 7 H 12th ed. p. 174; *Balwin, The* and N. 457.

'The Amending Act¹ of 1882 was passed to prevent needy people from being entrapped into signing documents which they cannot understand. The Bills of Sale Act, 1890, 1891, enacted that certain instrument hypothecating imported goods are not to be deemed Bills of Sale within the Act.'

The Bankruptcy Act², 1883, (46 & 47 Vict. c. 52) sec. 47, provides for voluntary *post-nuptial* settlement and not so as to affect settlements for valuable Consideration :

(a) With reference to the *husband's property in his own right*.

(1) If any *post-nuptial* settlement be made within two years of the subsequent bankruptcy of the settlor, it is void upon the bankruptcy (as against the trustee in bankruptcy and general body of creditors).

(2) If any *post-nuptial* settlement be made within ten years of the subsequent bankruptcy of the settlor, it will be void³ upon bankruptcy as against the trustee in bankruptcy unless and until the *cestui que* trust under the settlement satisfies the court that : (a) the settlement was not fraudulent as against the creditors of the settlor ; and (b) the trustees of the settlement had acquired the interest as soon as the deed of settlement was executed. If in the meantime that property is *bona fide* aliened, the transaction will stand⁴.

(b) With reference to the property of the husband in right of his wife—

Any *post-nuptial* settlement in favour of the wife and children of the settlor is binding if it be relating to property which has been acquired through the wife. If there be any *ante-nuptial*

¹Charlesworth v. Mills 1892, A. C. 31, Per Lord Halsbury,

²Williams' *Bankruptcy Practice*, pp. 259-265, 9th ed., 1908.

³The Word 'void' means voidable.

⁴Re Carter and Kenderine's *Contract* 1897, 1 ch., 776.

covenant or contract to settle property subsequently acquired the Act declares it void unless prior to the bankruptcy such property has been acquired and transferred in pursuance of the agreement. The covenant to settle property can be embodied in *post-nuptial* or *ante-nuptial* settlement. If it is contained in a *post-nuptial* settlement, it is voluntary, and the children of the marriage cannot enforce it; but if the covenant to settle is contained in an *ante-nuptial* settlement, the children of the marriage are deemed to be covenantees and can enforce the covenant to settle.

C.—DUTY TO DISCLOSE THE NATURE OF CONSIDERATION.

THERE ARE CASES IN WHICH THE LAW REQUIRES DISCLOSURE OF CONSIDERATION BY SETTING IT OUT IN A WRITTEN INSTRUMENT.

The expression of Consideration in conveyance is most important and should be accurately stated for several reasons, *e.g.*—

I. The Stamp Act¹ of 1891 (54 & 55, Vict. c. 39), sec. 5, enacts that all the facts and circumstances affecting the liability of any instrument to duty or the amount of the duty with which any instrument is chargeable are to be fully and truly set forth in the instrument. The Finance Act of 1899, § 12, enacts that stamp duty must be paid on true Consideration for value on instruments other than bill of exchange or promissory note. If Consideration is not stated, the validity of the conveyance itself may be questioned. It is not necessary to give Consideration to pass legal estate in law; but if there is no Consideration mentioned, a trust will be presumed. If Consideration is wrongly stated, presumption of fraud will arise².

¹ Sections 5, 12, *The Law of Stamp Duties*, by E. N. Alpe, 12th ed., 1911, p. 116; Finance Act, 1909-10, s.s. 74, 78.

² *Bridgman v. Green*, 1755, 2 Ves. S.E. 627.

II. The Conveyancing Act, 1881¹, enacts that any receipt for the Consideration of money (whether contained in the body of the deed or endorsed upon it) shall, in favour of a subsequent purchaser without notice of its untruth, be sufficient evidence of payment. The penalty for omitting to state Consideration² is £10 on any person who with intent to defraud the crown executes or is employed or concerned in or about the execution of any instrument in which all the facts and circumstances affecting the liability of the instrument or the amount of *ad valorem* duty chargeable are not fully and truly set forth. In Twyne's case³ Anderson C. J. refused to hold a voluntary conveyance as void against a subsequent purchaser because though he had paid valuable Consideration of money he did not act *bona fide*.

The Voluntary Conveyances Act, 1893, provides that a voluntary conveyance shall not, if in reality made in good faith and without any fraudulent intention, be deemed fraudulent under statute of 27 Eliz. c. 4.

III. Under the Copyhold Act, 1894, § 8 (1), it is declared that Consideration for enfranchisement shall be a perpetual annual rent charge or equivalent to interest at 4 per cent. on the amount of the land enfranchised. In other cases the compensation will be a gross sum paid before enfranchisement⁴.

IV. Every contract made by an urban authority exceeding £50 in value shall be in writing and sealed with the common seal of such authority⁵.

V. Every Bill of sale Shall be duly attested and registered within seven days after execution thereof or if it be executed out of England, within seven days at which it would ordinarily arrive in England and

¹ 44 and 45 Vict, c. 41, § 55.

² Elphinstone's *Introduction to Conveyancing*, 6th ed., 1906 p. 77.

³ I. S. L. C. 1.

⁴ Copyhold Act, 1894, s. 8 (2.)

⁵ The Public Health Act 1875, (38 and 39 Vict. c. 55), s.s. 73, 74. *The Public Health Acts*, by Lumley, 7th ed., 1908, pp. 403—414.

shall truly set forth the consideration for which it was given, otherwise it shall be void in respect of the personal chattel comprised therein¹.

Agreements reserving lien on business and effects are required to be registered as Bills of Sale under Bills of Sale Act, 1878, sec. 4, s². Bills of Sale of personal chattels made or given by way of security for the payment of money by the grantor thereof are void unless made by deed in statutory form³. A Bill of Sale given by way of security will be void under the Act of 1882 if it be given for less than £30 or if it be not in the form specified in the Act.

VI. Transfer of British⁴ ships or any share therein, when made to persons qualified to own them, is required to be made by Bill of Sale in the form of a deed⁵.

VII. Mortgages of British ships or any share therein and transfers of registered mortgages of British ships or of any share therein must be made in the form of a deed⁶.

VIII. The Statute of Frauds⁷ (29 Ca. II. c. 3, sec. 4) enacts that every simple contract must have a consideration, and it has been decided in *Wain v. Walters*⁸ that a statement of consideration must be included in the writing. The Mercantile Law Amendment Act, 1856 (19 & 23 Vict., ch. 97, sec. 3), enacts that as regards guarantees, this is no longer required.

¹ Balwin, *Law of Bankruptcy and Bill of Sale Act*, pp. 484-85.

² *Coburn v. Collins*, 35 ch. D. 373.

³ See Bills of Sale Act, 1878, and Amendment Act, 1882 (45 and 46 Vict. c. 43) 9.

⁴ Abbot's *Law of Merchant Ships' and Seamen*, 14th ed., 1901.

⁵ Merchant Shipping Act, 1894, (57 and 58 Vict. c. 60).

s.s. 1, 2, 24, 65 (2), and First Schedule, Part II, Form A, Bill of Sale.

⁶ Merchant Shipping Act, s.s. 31, 37 65 (2), and First Schedule, Part I, Form B, Mortgage.

⁷ *A Treatise on the Law of Frauds on its Civil Side*, by Melville M. Bigelow, p. 290

(n), 54 (n); (1890).

⁸ 5 East 10 (1804.)

CHAPTER IV.

THE DOCTRINE OF CONSIDERATION IN ENGLISH AND ANGLO-INDIAN LAW COMPARED.

The English Common Law was introduced by Royal Charters during the eighteenth century in the presidency towns of Calcutta, Madras, and Bombay ; the whole of the Common Law of England was not introduced but only in so far as it was applicable to the circumstances of the Indian subjects.* Lord Stowell in *The Indian Chief*¹ has shown the bearing of Asiatic personal law. He said : “ In the East from the oldest times an immiscible character has been kept up ; foreigners are not admitted into the general body and mass of society of nations, they continue strangers and sojourners as all their fathers were, not acquiring any national character under the general sovereignty of the country and not trading under any recognised authority of their original country, they have been held to derive their present character from that association or factory

Note—

*An Englishman would naturally interpret the expression “ justice, equity and good conscience ” as meaning such rule of English Law as he happened to know and considered applicable to the case ; and thus, under the influence of English judges, native law and usage were, without express legislation largely supplemented, modified and superseded by English Law. Ilbert, *The Government of India*, 2nd ed., p. 330. Pollock writes : the Common Law has acquired in

India a kind of moral preference. *Expansion of Common Law*, pp. 132-34.

The Common Law, writes Pollock, has ever gone forth into the world beyond the narrow sea under or in company with the British Flag ; and wherever the British Flag has gone, much of the spirit of the Common Law has gone with it, if not the letter also ; see the *Genius of the Common Law*, 1912, p. 85.

¹1801, 3 *Robinson Admiralty Report*, pp. 28-29.

under whose protection they live and carry out their trade." The Statutes of 1781¹ and of 1797² enacted that in Calcutta, Madras and Bombay respectively the courts had, in cases against the inhabitants of the said towns pertaining to succession and inheritance to lands, rents and goods and all matters of *contracts* and dealing between party and party to apply in the case of Mahomedans, the laws and usages of Mahomedans, and in case of Hindus, the laws and usages of Hindus ; and where only one of the parties was a Mahomedan or Hindu the judge was to apply the laws and usages of the defendant. This is the spirit of Hindu law. A king who knows the revealed law must enquire into the particular laws of classes, the laws or usages of districts, the customs of traders, and rules of certain families and establish their peculiar laws if not repugnant to the law of God³.

The law of Shastras is contained in the Institutes of Manu who writes : " Let the king establish the laws of the conquered nations as declared in their books " (ch. VII, sec. 203).

The Society in Manu's Institutes had emerged from purely tribal nomadic conditions⁴. Intention and consent being the soul of every agreement, the minds of the parties shall be in condition at the time to be capable of contracting⁵. A contract made by a person intoxicated or insane or grievously disordered or wholly dependent, by an infant or decrepid old man, or in the name of another by a person without authority is utterly void⁶.

The Indian Contract Act (IX of 1872) applies to the whole of British India. It enacts that nothing herein contained shall affect the provisions of any statute or regulation not hereby expressly repealed, nor any usage or custom of trade nor any incident of any contract,

¹21 Geo. III, c. 70, s. 17.

²37 Geo. III, c. 142, s. 13.

³Manu, ch. VIII s. 41.

⁴*Sacred Books of The East*.

⁵Vol. XXV, Part 8.

⁶Manu, ch. VIII, s. 168.

⁶Manu, ch. VIII, s. 163.

not inconsistent with the provisions of this Act. The Act does not cover the whole subject of the law of contracts. In the preamble it is stated: Whereas it is expedient to define and amend certain parts of the law relating to contract, it is hereby enacted as follows: 'It is incumbent on the High Courts of Justice in the exercise of their original jurisdiction to apply the Hindu law of contract to Hindus and the Mahomedan law of contracts to Mahomedans' *e.g.*, the rule of Damduput by which no greater arrears of interest can be recovered *at one time* than what will amount to the principal sum is applied in some cases. Manu writes: "Interest on money received at once, not month by month or day by day as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time."¹ The word principal is confined to the original sum alone². This rule obtains in the town of Calcutta and the Presidency of Bombay. It does not prevail in Madras at all. The rule has been abrogated by Transfer of Property Act 1882, so far as concerns interests on mortgages governed by that Act. The Hindu law of gifts applies to Hindus, and the Mahomedan law of gifts and Waq, applies to Mahomedans.

Consideration is defined as follows: When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a Consideration for the promise³.

It is essential to understand the meaning of the words proposal and promise. When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that

¹Ch. VIII, s. 151; Brispatis *of Comparative Legislation*, XI, 13; Vajnavalkya II, 39; 1900, p. 464.
Gautama XII, 31

³Contract Act, of 1872, s.2.

²*The Rule of Damdupu*, by F. (d). sections 10, 23, 24, 25.
R. Vicaji in *Journal of Society*

other to such act or abstinence, he is said to make a proposal; when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise. [sec. 2 (a), (b)].

The Act limits the meaning of the word promise to such proposal which is made with "a view to obtaining the assent of the other" before any liability can arise. It is used with that restricted legal meaning. It is the peculiarity of the English and Anglo-Indian law not to give legal sanction to all deliberate promises without proper regulations and safeguards. Hindu and Mahomedan law gave legal sanction to all deliberate promises¹. In Mahomedan law the term contract has a more extensive meaning. It means the union of elements of disposition meaning offer and acceptance, "*Ijab*" means proposal and "*qubul*" means acceptance of that proposal. The analysis of contract shows that there must be at least two parties, a proposer and an acceptor; their minds must be agreed about some matter with object of producing legal liability². There are other systems that have taken a different course by making rules of evidence the proper safeguards so that people should not be obliged to carry out their rash and hasty promises. English Common Law has not accepted the Roman view, and Anglo-Indian law follows the English doctrine.

Dr. Whitley Stokes writes the Indian Act keeps the doubtful doctrine that a Consideration executed on actual request will support a subsequent express promise³.

The definition of the word Consideration does not seem to be in complete accord with the English meaning.

¹Manu, ch. VIII; Colebrooke *Digest of Hindu Law*, 1907. p. 218.
s. 16.

²Sharhi Viquya, *Mahomedan Law*. Vol. 11, pp. 4, 5; *Principles of Mahomedan Juris-*

prudence, Tagore *Lectures*, 1907. p. 218.
³Anglo-Indian Code, with Supplements, 1887-89, page 547 note 7.

It seems to be based on the recommendation of the Commissioners' draft. It is defined as follows: "A good Consideration must be something which at the desire of the person entering into the engagement, *another* person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing¹.

Consideration may consist of something done or suffered for the promisor or of a promise given to him. The words 'has done or abstains from doing' correspond to the English law as executed Consideration. The words 'does or abstains from doing or promises to do or to abstain from doing' correspond to the English law as executory Consideration. In order to constitute a Consideration according to Anglo-Indian law any act done in the past is not Consideration. It must be done 'at the desire of the promisor'. In English law it must be an act done by the plaintiff from which the defendant, or a stranger, acquires a benefit or advantage, detriment is sustained by the plaintiff with the assent of the defendant. In the language of pleading the 'plaintiff acted at the special request of the defendant², e.g., if the plaintiff supplies goods to a third person at the request of the defendant, it is consideration for a guarantee given by the defendant to the plaintiff. But if any third person acts independently of the defendant's request, it will not be Consideration at all. It is not essential that the promise and request should be at the same time. The act or abstinence which constitutes Consideration in Anglo-Indian law may be done by a person other than the promisee himself; but in English law, Consideration must proceed from the plaintiff on the promise. If the thing which constitutes Consideration is done or suffered by a third person, it must be at the bidding of the promisee. The act constituting Consideration must be done at the

¹Sec 10, expl. 3, of the original draft.

²*Carlill v. Carbolic Smoke*

Ball Co., 1893, 1 Q. B. D. 271.

Laythorpe v. Bryant, 3 Scott. 238, 250.

desire of the *promisor* and not at the desire of a third person, *e.g.*, if X says to Y that if he (Y) will go to Madras, when asked by Z, Z will pay him 50 rupees; if Y really goes when asked by Z, it will be a good Consideration for the promise to pay, though this was not brought about by the promisee Z. The defendant at the request of his step-mother, who was administratrix under his father's will, executed a promissory note for a certain sum due by the deceased father to the plaintiff and she gave some assets in satisfaction of the note. Held, it was good Consideration for the note¹.

The Anglo-Indian law favours the rule laid down in *Lampleigh v. Braithwait*² and has not adopted any modification as accepted by the recent cases. The rule that a past Consideration if given at the request of the promisor will support a subsequent promise is without any authority. Anson raises the question if any limit of time is to be assigned between the act done upon request and the promise made in Consideration of it. In *Bradford v. Roulston* (1858, 8 Ir. C. L. 468) it was expressly held that a past Consideration which had taken the form of the execution of a bill of sale to third parties upon the request of the defendant was a good Consideration for a subsequent promise by him to answer for that default. Anson³ writes: 'The subsequent promise is only binding when the request, the consideration and the promise form substantially one transaction, so that the request is virtually the offer of a promise and the precise extent of which is hereafter to be ascertained.' In *Lampleigh v. Braithwait*, Erle C. J. said: 'It was assumed that the journeys performed at the request of the defendant and other services he rendered would have been sufficient to make any promise binding if it had been connected in one contract.' At the present day if such service is rendered on the request there would be an implied promise to

¹I. L. R. 6 Madras 351.

³*Contracts*, 116, (12th ed).

²S. L. C. 141. (11th ed.)

pay for what it was worth ; and subsequent promise would have been evidence for the jury to fix the amount¹.

The terms of the section indicate that if service be done as a favour and without any indication to pay for the trouble by either party, yet the party who has derived benefit may afterwards bind himself by his promise to pay. Under § 25 (2) it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do. In the cases mentioned above there is Consideration, executed upon request which is to be distinguished from an acceptance of an executed Consideration. *e.g.*, a merchant leaves goods at B's house by mistake. B treats the goods as his own. B is bound to pay A for the goods (§ 70).

In Anglo-Indian law the words good and valuable Consideration mean the same thing ; and the distinction which prevails in real property in English law does not obtain in Anglo-Indian law.

Consideration may be immoral (§ 23).

Consideration may be fraudulent, usurious².

Anglo-Indian law does not recognise division of contracts into those of simple contracts and those under seal. Consideration must be proved if denied. In Hindu law there is also no contract under seal. Contracts may be reduced to writing. Consent must be given in writing. The written act is a memorial of the contract already made and settled. It is mere evidence.

Where the contract is concluded by mutual assent, the written memorial of it should be attested after the lenders' name has been first inserted³.

¹Kennedy v. Brown, 13 C. IV of 1832, s. 53.
B. N. S., 677.

²Transfer of Property Act, *Colebrooke's Digest of Hindu Law*, 3rd ed., 1 Vol. 19.

A.—RULES OF THE ANGLO-INDIAN DOCTRINE
OF CONSIDERATION IN THE LAW OF
CONTRACT COMPARED WITH THOSE
IN THE ENGLISH DOCTRINE.

**RULE I.—An Agreement made without Consideration
is void unless :—**

(1) It is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between the parties standing in near relation to each other ; or unless :

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do, or unless :

(3) It is a promise made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract. Explanation. Nothing in this section shall affect the validity as between the donor and donee of any gift actually made* (Act IX of 1872, sec. 25).

English Common Law provides that formal contracts are binding owing to the form without any Consideration. Anglo-Indian law has no formal contract of deed. All contracts must have Consideration, whether under deed or not, except in the cases specially mentioned.

The exceptions to the general rule on account of the peculiarity of the mercantile law are similar in Anglo-Indian law. Negotiable Instrument Act (No. 26 of 1881), §§ 43, 44, 45, 118 (g), and Evidence Act (1 of 1872), § 114, follow English law and Consideration is presumed in favour of a holder in due course, and English cases are followed in interpreting the Acts.

* Indian Ramaswami v. Anglo Indian Codes, p. 562,
Amthappa Chettiar, 16 M. L. Note 1.
J. 422, 426 ; Whitley Stokes,

In India the fact of an instrument being under seal does not import any Consideration for the agreement¹.

In the case of bills of exchange and promissory notes in English law, and also in Anglo-Indian law, a presumption is raised in favour of value received; the burden of proof is on him who denies that Consideration was given²; if the acceptor of a bill sued on was incapable, ignorant, or under the influence of the drawer, it will shift the burden of proof.

The Law Merchant has made an exception to the rule of Consideration in the matter of negotiable instruments. The Negotiable Instruments Act, XXVI of 1881, sec. 118 enacts that until the contrary is proved the presumption, shall be made that every negotiable instrument was made or drawn for Consideration; and that every such instrument when it was accepted, endorsed, negotiated or transferred was accepted, negotiated or transferred for Consideration³. The English doctrine that the solemnity of a deed is sufficient to make a promise expressed in sealed writing binding is not the legal view in British India⁴. It had become the established practice of the Courts in India, in cases of contract to require satisfactory proof that consideration had been actually received according to the terms of the contract, and that it had never been held there that a contract made under seal of itself imported that there was a sufficient consideration for the agreement.

Chalmers⁵ gives an account of the Hindu system of banking and summary of Case-law as to hundis before the Negotiable Instruments (Act XXVI of 1881) was passed. There were *hundis* and *chittis* by which one merchant could draw on another merchant

¹ 12 Moore I. A. 314.

² Act XXI of 1881, s. 118.

³ Evidence Act I of 1872, s. 114, illustration C.

⁴ Kaliprasad Tawari v. Raja

Sahib Prahlad Sen (1869), 2 B. L. R. (P. C.), p. 122.

⁵ Negotiable Instrument (3rd ed.) pp. 28—32.

in favour of the person named. The Hindu law did not develop the idea of credit in mercantile transactions to its full extent. In Mahomedan law the idea of the negotiability of instruments was not developed at all.

RULE II.—When at the Desire of the Promisor, the Promisee or any other Person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a Consideration for the Promise. Contract Act (IX of 1872), Sec. 2 (d).

The definition has a wider meaning than in English law.

The act or forbearance which is essential in Consideration must be done at the desire of the promisor. If it is done at the instance of a third party or without the desire of the promisor, it is not Consideration.

Cases: The Municipality of Howrah wanted to raise money by public subscription for the purpose of a town hall and appointed several commissioners to form the committee. Defendant promised to pay Rs. 100 towards that object. The commissioners, including the plaintiff, gave a contract to build the hall. The defendant did not pay his subscription, and the contractor sued him for the same. The Court decided that the defendant was liable because there was Consideration for the promise. The subscribers knew that the contract was given on the faith of their promises to pay the stated sums. In fact, the plaintiff in giving the contract to build the hall was acting at the desire of the defendant. If no contract had been entered into and no liability had been incurred, the promise would have been considered without any Consideration and consequently would have been void. English law is different because it cannot be said that the contractor agreed to build the hall at the desire of the promisor.

The rule in English law is that Consideration must move from the promisee. Leake on *Contracts*[†] explains the rule that the matter of Consideration must be given, done or suffered by the promisee himself, or if by a third party, at the request and by the procurement of the promisee, and as agreed equivalent for the promise; and with this meaning, the rule seems to import no more than is necessarily implied in the conception of a Consideration. In Anglo-Indian law the Consideration may proceed from the promisee or any other person. This extended meaning restores and extends the doctrine of several cases decided before 1688. The Case of *Dutton v. Poole* (1688, 2 Lev. 210) is good law in British India. In that case the whole Consideration moved from the father, and on the son giving a promise to the father to provide for his sister, the father abstained from felling the timber and in consequence the estate descended to the son as heir with the timber. The court decided that owing to the near relationship between the plaintiff (daughter) and the party who gave the value (father), the plaintiff was deemed to be party to the Consideration. In other words, a stranger to the Consideration could be regarded as a party to it, owing to close relationship with the person from whom the Consideration moved. In *Tweddle v. Atkinson* (1861, I. B. and S. 393) that decision was overruled. It was decided that the plea of nearness of relationship to the contracting persons was not material. Hence, so far as English law is concerned, it is a clear rule that a third party cannot sue on a contract, though made for his benefit. Innes¹ J. discriminated *Tweddle v. Atkinson*. X transferred his property to his daughter by way of gift on condition that she would pay annuity to X's brother. The daughter at the same time executed a writing to pay annuity to X's brother. The daughter failed to fulfil the promise and was sued in consequence

[†] Law of Contracts (5th ed.) p. 431. Khwaja Mahomed Kahn (1910) 32 All. 410, 413 (P.c)

¹Chinnaya v. Ramypya (1881) I. L. H. R. 4 Mad. 137. Rukhmabai v. Govind (1904) 6 Bom. L. R. 421.

by the brother. The plaintiff contended that no Consideration was paid by the brother who was stranger to it and had no right of action. Innes J. held that *indirectly* the Consideration moved from the brother to the plaintiff. In *Tweddle v. Atkinson* no Consideration moved directly or indirectly from the defendant. The section is quite clear and *Dutton v. Poole* is good law in India. In Indian law nearness of relationship is not a matter of importance. The Act states that Consideration may proceed from a third party; and it is not necessary that the third party should be related to the contracting parties at all. In *Samuel v. Ananthanatha* (1883, 6 Mad. 351) the facts were that the administratrix of the property of a deceased person agreed to pay one of the heirs of the deceased a share of the estate, if a promissory note were made for a barred debt due to a creditor of the estate. The note was executed according to the promise in favour of the creditor and handed over to the administratrix. The creditor sued the heir on the note. The court decided that there was Consideration for the heir's promise to the creditor and the action was allowed. In this case the creditor and administratrix were strangers. In English law the decision would have been quite the contrary in both cases. *Price v. Easton* (1833, 4 B. and Ad. 433) would be good law under the Act though not in English law; for the act which A did at the desire of Easton (promisor) entitled him to the amount which A owed to Price.

The words 'has done or abstained from doing' show that Anglo-Indian law departs from the rule of English law. The rule of English law is that in order to make a contract Consideration must be given and accepted in exchange for the promise, and it is absolutely essential that Consideration must be accepted along with the promise at the same time. The Act departs from English law and follows *Lampleigh v. Braithwait* (1615 Nob. 105 I. S. L. C. 141) a mere voluntary courtesy will have a Consideration to uphold an assumpsit in Anglo-Indian law. In *Sindha v. Abraham* (1895, I L. R. 20

Bom. 755), the agreement was to compensate for past services. The court decided that it was valid under the Act.

Every promise and every set of promises forming the Consideration of each other is an agreement ; promises which form the Consideration or part of the Consideration for each other are called reciprocal promises. Sec. 2 (e), (f), deals with the subject of mutual promises ; each promise is Consideration for the other. The effect of mutual promises does not follow from the general notion of Consideration, but is the outcome of commercial progress in a complex state of society and is due to the peculiar requirements of each system of law. Consideration if it consists in performance is said to be executed ; if it consists in a promise, it is said to be executory.

RULE III.—Consideration must be the act, forbearance or promise of the promisee in English law but in Anglo-Indian law Consideration may proceed from the promisee or any other person.

In Anglo-Indian law a stranger to the Consideration can enforce a promise. It is wider than the old rule of English law because that stranger need not be a relation of either of the contracting parties¹.

The rule is in accord with the spirit of Hindu and Mahomedan law. The consent of the parties to be legally bound constitutes the contract ; and if the intention is to benefit a third party, he can enforce the contract by expressing consent.

RULE IV.—Any act or Abstinence or promise may be a Consideration for the promise.

Whitley Stokes criticizes the above rule because words are wanted to show that the consideration must be of some value and suggests that the following should be

¹Dutton v. Poole, 2 Lev. Braithwait 1 L. C. 141 are 210, Price v. Caston, 1833-4 good authorities in British B and Ad, 433, Lamplough v. India.

added and the promisee or such other person did or does thereby undertake some burden or lose something which in contemplation of law may be of value¹.

In practice the legal effect of Consideration in making promises obligatory is withheld from acts, forbearances and promises on the ground of there being no Consideration. The Act is silent and it does not expressly say anywhere that Consideration must be valuable. Whitley Stokes² maintains that from the silence of the Act it is not to be concluded that the framers of the Act had any intention to depart from the English rule. So in practice the result is the same in English and Anglo-Indian law.

Consideration need not be an adequate return for the promise but must be of some value in the eye of the law. This is true both of English and Anglo-Indian law³. An agreement to which the consent of the promisor is freely given is not void merely because the Consideration is inadequate ; but the inadequacy of the Consideration may be taken into account by the court in determining whether the consent of the promisor was freely given. *Illustrations.*

(1) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the Consideration.

(2) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given. The inadequacy of the Consideration is a fact which the court should take into account in considering whether or not A's consent was freely given.

While the adequacy of Consideration is not material there must be, according to the English rule, some value attached to it. This rule is followed in practice in Indian law, though it is not expressly mentioned in the Act

¹ Anglo Indian Codes Vol. I, 497.
1, p. 456.

³ Section 25, Explanation 2.

² *Anglo-Indian Codes*, Vol.

It may consist in some right, interest, profit, or benefit accruing to one party, or some detriment, loss, responsibility or forbearance suffered or undertaken by the other party, *e.g.*, to give time to a debtor is a good Consideration but a promise founded on motives of generosity, prudence and natural duty is without Consideration. According to Anglo-Indian law, such a promise must be expressed in writing and registered and made on account of natural love and affection between parties in a near relation to to each other¹. A promise to pay for past services rendered to a woman before her marriage with the promisor, or to a son whom the promisor is not bound to support, has been decided to be without Consideration in English cases. In Anglo-Indian law a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor, will be binding even though the agreement was made without Consideration.

The Anglo-Indian law follows the principles of English law and equity. The court leaves the parties to make their own bargains. The standard or exchangeable values must be fixed by the parties themselves, because the values of all things, says Hobbes in the *Leviathan* contracted for 'is measured by the appetite of the contractors and, therefore, the just value is that which they be contented to give².'

In *Gravelly v. Barnard*, 1874, L.R. 18 Eq., 518, the agreement was to continue an existing service (the time during which the agreement was to last was not mentioned) determinable at the option of the parties, it was held that there was sufficient Consideration.

The Specific Relief Act I of 1877, Sec. 28 (a), enacts that inadequacy *per se* is not any ground for refusing specific performance. The English decisions follow the law laid down in the Act.³ If the Consideration is grossly inadequate, it may be evidence of fraud or undue

¹Section 25 (1).

²*e.g.* *Bainbridge v. Firms-*

stone, 1838. 8 A. and E. 743.

³*Pollock on Contract*, p. 60.

influence. In the *Administrator-General of Bengal v. Juggeswar Roy*, 1877, 3 Cal. 192, the judicial committee said "The question is whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. Lord Westbury said: "My Lords¹ it is true that there is an equity which may be founded upon gross inadequacy of Consideration but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of imposition." Held that the evidence of the inadequacy of the price was not such in the case before them as to lead them to conclude that the plaintiff did not know what he was about or was the victim of some imposition. Westropp C. J.² said: "Inadequacy of Consideration when found in conjunction with any other such circumstance as suppression of the true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding or even ingorance is an ingredient which weighs powerfully with a Court of Equity whether it should set aside contract or refuse to decree specific performance of their³."

In Hindu law inadequacy is of no value, provided the parties have given their real consent without any fraud or imposition. A man who has bought anything in the world that has a fixed price and is not perishable as land or metals, and wishes to rescind the contract may give or take back such a thing within ten days⁴. Jaganath explains this text by saying that price must be excessive to claim rescission of sale⁵. In Mahomedan law the buyer has certain options to get rid of the promise even after the bargain is completed and the property is delivered. These are options of defects⁶. Now the

¹Tennant v. Tennants (1870), L. R. 2 S. and D 6, 9.

²Kedari Bin Ranu v. Atmarambhat, 1866, 3 B. H. C. A. C. 11, 19.

³Transfer of Property Act s. 53 d. (2) Specific Relief Act 1 of 1877 28 (a).

⁴Manu, ch. VIII, s. 223.

⁵Colebrooke on obligations p. 45 Strange, *Hindu Law* Vol. I, ch. 2 p. 273.

⁶Baillie's *Digest of Mahomedan Law*, Vol. I, ch. 3, pp. 33-50; Macnaghten's *Principles of Mahomedan Law*, p. 44.

matter is regulated by the Indian Contract Act, ch. VII, and Transfer of Property Act, § 53.

‘Mahomedan law’, writes Palgrave, ‘errs sadly by excess in its practical regulations to almost every detail of life.’ These restrictions are ‘positively injurious when maintained in the midst of an advanced or advancing order of things’¹.

The Indian Contract Act has swept away these restrictions and the rule of English doctrine is applied, giving the parties freedom to enter into contract without inquiring into the adequacy of Consideration.

RULE V.—The object of an Agreement must be lawful, possible, and allowed by the law of the land.

The Consideration or object of an agreement is lawful unless :

- (1) It is forbidden by law ; or
- (2) Is of such a nature that if permitted it would defeat the provisions of any law or is fraudulent ; or
- (3) Involves or implies injury to the person or property of another ; or
- (4) The court regards it as immoral or opposed to public policy.

In each of these cases the Consideration or object of an agreement is said to be unlawful. Every agreement of which the object or Consideration is unlawful is void².

Section 24. If any part of a single Consideration for one or more objects or any one or any part of any one of several Considerations for a single object is unlawful, the agreement is void. Illustration : promises to

¹*Essays on Eastern Questions*, p. 72 ; *Central and Eastern Arabia*, Vol. I, 272.

²Contract Act IX of 1872, s. 23. *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1906), 33 Cal. 702, 710, on

Appeal (1907), 34 Cal. 289, the words “Object” and “Consideration” are *Harrison v. Harrison* (1910) 1 K B 35 not synonymous but distinct in meaning, the word “object” means purpose or design.

superintend on behalf of a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay a salary of Rs. 10,000 a year. The agreement is void, the object of *A*'s promises and the Consideration for *B*'s promise being in part unlawful. *Willies J.*¹ said : " The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void ; but where you can sever them, whether the illegality be created by statute or by Common Law, you may reject the bad part and retain the good ".

Section 26. Every agreement in restraint of the marriage of any person other than the minor is void.

Section 27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void.

Exception 1.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein ; provided that such limits appear to the court reasonable regard being had to the nature of the business.

Exception 2.—Partners may upon, or in anticipation of, a dissolution of the partnership agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceeding section.

Exception 3.—Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.

Section 28. Every agreement by which any party hereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal

¹*Pickering v. Ilfracombe* p. 250.
R. Co. (1868), L. R. 3 C. P.,

proceedings in the ordinary tribunal, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1.—This section does not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

And save as provided by the Code of Civil Procedure (and the Indian Arbitration Act, 1899) no contract to refer (present or future differences) to arbitration shall be specifically enforced: but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit.—The Specific Relief Act, 1877.

Exception 2.—Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen or affect any provision of any law in force for the time being as to reference to arbitration.

Section 29. Agreements, the meaning of which is not certain or capable of being made certain, are void.

Illustrations: *A* agrees to sell *B* ‘a hundred tons of oil’. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

A agrees to sell to *B* ‘my white horse for rupees five hundred or rupees one thousand’. There is nothing to show which of the two prices was to be given. The agreement is void.

¹*Cf.* the Specific Relief Act Indian Evidence Act No. 1 of No. 1 of 1877, s. 21 (c), and the 1872, s.s. 94-97.

Section 30. Agreements made by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money of the value or amount of five hundred rupees or upwards to be awarded to the winner or winners of any horse-race.

Nothing in this section shall be deemed to legalise any transaction connected with horse-racing to which the provisions of sec. 294-A of the Indian Penal Code supply.

Section 56. An agreement to do an act impossible in itself is void.

A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew or with reasonable diligence might have known and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such person for any loss which the promisee sustains through the non-performance of the promise.*

Section 57. Where persons reciprocally promise, first, to do certain things, which are legal and, secondly, under specified circumstances to do certain other things, which are illegal, the first set of promises is a contract, but the second is a void agreement.

* The *Salvador* No. 2 (1909) 25 T. L. R. 727 c. A. court declined to follow the principle laid down in *Taylor v. Caldwell* (1863) 3 B and S. 826.
Grimslick and Sweetman (1909) W. N. 182 when the

Section 58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful Consideration and with a lawful object, and are not hereby expressly declared void (see. 10).

The object and Consideration which are declared unlawful in Anglo-Indian law are contained in the above sections. The English cases which declare agreements to be unlawful on the ground of immorality or public policy are mere illustrations. The words of the Act are binding on the courts and point out the principles which are applicable to Indian circumstances.

In Hindu law an agreement that has been made contrary to the law or settled usage can have no legal force though it be established by proof¹. In Mahomedan law the objects of the bargain must not be illegal (Haram), literally forbidden to Mahomedans or expressly prohibited by law, or those which are abominable or improper². If there is an element of speculation, it is illegal, *e.g.*, gambling transactions, such as Muzabana (sale of dates on a tree in Consideration of plucked dates) and Munabadha (sale in which the shopkeeper would throw an article toward intending buyer against his wish³).

Cases illustrating the rule.

Forbidden
by Law.

Anything which is prohibited for the public welfare cannot be made lawful by paying a penalty for it. The principles of the English Excise Acts are applied in construing local Acts dealing with similar subjects.

Provisions
of any Law.

There are various Acts of the legislature which forbid certain acts. These acts may be forbidden by (a) express legislation ;-(b) the personal law of Hindus.

¹Manu ch. VIII, s. 164.

²Baillie, Vol. I, ch. I, pp. 2-8.

³Tagore Lectures on Mahomedan Jurisprudence, (1911) p. 28.

If an agreement is made relating to an object which Hindu law forbids, this Act will forbid it also, *e.g.*, if an agreement is made to adopt a son in Consideration of money to be paid annually to the parents of that boy, it will not be valid, because in Hindu law a *dattak* son is one who is *affectionately* given by his father or mother. In *Eashan Kishor v. Hari Chandra*¹ it was said: "If it could be proved that the boy was *purchased* and not given, it is very probable that the adoption would be set aside." Any agreement between married parties among Hindus, that the husband will not compel his wife to leave her own parents' house and come and stay with him is illegal, because if it be permitted it would be inconsistent with Hindu law on the subject of marriage and also opposed to public policy.

The Transfer of Property Act of 1882 (sec. 53) Fraudulent. enacts that 'every transfer of immovable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed.' Where the effect of any transfer of immoveable property is to defraud, and defeat or delay any such person and such transfer is made gratuitously or for a grossly inadequate Consideration, the transfer may be presumed to have been made with such intent as aforesaid. Nothing in this section contained shall impair the rights of any transferee in good faith and for Consideration.

Harrington v. Victoria Graving Dock Co. decides 'Immoral' that if any person agrees to give bribes to a person who Considera- is already employed or is about to be employed in the tion. service of another person with a view to induce that employee to act otherwise than with fidelity to his employer, the agreement is a corrupt one and not enforceable at law². The law refuses to lend its assistance to enforce agreements relating to immorality, concubinage. *Collins v. Blantern*³ is a leading case on the subject. The principles which govern English cases are applicable

¹1874, 13 B. L. R., App. 42.

³1. S. L. C., 11th, ed., 364.

²1878, 3 Q. B. D., A. 549.

to Indian law. If a bond is given in Consideration of past service which was of an immoral nature it will not be void. In English and Anglo-Indian law such Consideration is not held good in order to support a promise in the future; but in Anglo-Indian law a promise to pay a person an allowance on Consideration of past service is not illegal. Under sec. 25 (2) it is enacted that 'a *promise* to compensate wholly or in part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do' will be binding. Lord Selborne¹ gave a summary of English cases so far as the contracts were founded on immoral Consideration.

- (a) Bonds or covenants founded on past cohabitation whether adulterous, incestuous, or simply immoral are valid in law, and not liable (unless there are other elements in the case) to be set aside in equity.
- (b) Such bonds or covenants if given in Consideration of future cohabitation are void in law and therefore also void in equity.
- (c) Relief cannot be given against any such bonds or covenants in equity if an illegal Consideration appears on the face of the instruments.
- (d) If an illegal Consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law.
- (e) Under some circumstances but not under all, when the Consideration is unlawful and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity.

¹In *Ayerst v. Jenkins*, 1873, 16 Eq. 275, 282. See note to *Benyan v. Nettlefold Mac* and G. 100; *Upfill v. Wright* (1911), 1 K. B. 506, 510 Per Darling J.

In *Gaurinath Mookerji v. Madhumani Peshakar*, 1872 9 B.L.R., App. 37, the court decided that a landlord cannot sue to recover rent of rooms knowingly let to a woman of immoral character who lives immoral life there. In *Dhiraj Kuar v. Bikramajit Singh* (1881), 3 All. 787, the court decided that a suit would lie for arrears of allowance agreed to be paid to a woman for past service. *Lakshminarayana v. Subhadri Ammal* (1908), 18 Mad. L. J., p. 130, per Bhashyam Aiyangar J. was to the same effect *Meherally v. Alimahomed Aiyeb* (1912), 37 Bom. 280, per Batchelor J., agreement for future separation arrived at between husband and wife (who are Mohomedans) is void as opposed to public policy under sec. 25 of Indian Contract Act. The court regarded the promise to pay an allowance as an undertaking on the part of the defendant to compensate the woman for past services voluntarily rendered to him, for which no consideration as defined in the Act would be necessary. In English law the alleged Consideration would be bad simply as being a past Consideration.

In *Janson v. Driefontein Consolidated Mines*¹, Lord Halsbury said: "In treating of various branches of the law learned persons have analyzed the source of the law and have sometimes expressed their opinion that such and such a provision is bad because it is Contrary to public policy; but I deny that any court can invest a new head of public policy," and Lord Davey added 'public policy is always an unsafe and treacherous ground for legal decision'. Agreements may be opposed to public policy, because their tendency may be to prejudice the state in various ways, e.g., trading with an enemy. All trade with public enemies without obtaining licence from the Government is unlawful. Lord Macnaghten in the above case² said: "The King's subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a Government

Consideration opposed to Public Policy.

¹1902 A. C., pp. 484, 491, C. J. (1902) A. C. 500: *Govind v. Pacheco* (1902), ²(1902) A. C., p. 499.
4 Bom. L. R. 948. Per Jenkins

at war with the King without the King's licence." Public policy, in my opinion, requires a good citizen in matters of this sort to Conform to the rules and guidance of the state." Lord Westbury in *Williams v. Bayley*¹, said : " You shall not make a trade of a felony." If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself." In *Kessowji v. Harjivan*² the court decided that 'a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not in Consideration of such securities agree not to prosecute, and such an agreement will not be inferred from the creditor using strong language. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties.'

Champerty
and Maintenance.

The object is to promote litigation in which a person has no personal interest. Maintenance is a genus while champerty is a species. Blackburn J. described champerty as a bargain whereby one party is to assist the other in recovering property and is to share in the proceeds of the action³. In *Fischer v. Kamala Naicker*⁴. Sir John Coleridge said : "the champerty or more properly, the maintenance was something which must have the qualities attributed to champerty or maintenance by the English Law ; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary."

¹(1866) L. R. I H. L 200, 220.

²1887 L. R. II Bombay 566. 57 Per Farran J.

³*Hutley v. Hutley*, 1873, L.R. 8 Q. B. 112, 115, explained in *Guy v. Churchill*, 40, ch.D

488 Per Chitty J : *Rees v. Rees De Bernardy* (1896) 2 ch 437, 447 *Jai Kumar v. Gauri Nath* (1906), 28 All. 718 ; *Dalsukram v. Charles de Bretton* (1904), 28 Bom. 326.

⁴1860, 8 M. I. A. 170, 187

In *Ram Cooma Coondoo v. Chunder Canto Mookerjee*¹ Sir Montague E. Smith said that 'a fair agreement to supply funds to carry on a suit in Consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property, itself, should be assisted in this manner. But agreement of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the partyeffect ought not to be given to them.' The same case decided that the specific English law of Maintenance and champerty was not introduced into India. An agreement champertous according to English law was not necessarily void in British India; it must be against public policy to render it void. In *Mayor of Lyons v. East India Company*² Lord Brougham decided that what the courts have to do in India is to apply the broad principles of equity and good conscience and to consider whether a transaction impeached on the ground of maintenance is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair transaction got up to obtain spoil: it follows that if an agreement is made to supply funds to carry an action in Consideration of obtaining a share of the property if recovered, it should not be deemed as by itself to be contrary to public policy. The Hindu Law relating to contracts does not countenance such agreements because they are opposed to the general principles as regards public policy and the administration of Justice.

¹1876, 4 I. A. 23. 42, 47. ten, 121.
Kunwar Ram Lal v. Nilkanth ²(1836) Moore's I. A. 176.
 1893)L. R. 20 I. A. 112. 115) 270 *Bhagwat Dayal Singh v.*
Lal Achal Ram v. Raja *Debi Dayal Sahu* (1908).
Kazim Husain Khan L. R. 32 35 I. A. 48, 55, 56.
 I. A. 113. Per Lord Macnagh-

Any agreement to bring about marriages for reward is void according to the Common Law of England¹. In Hindu law the consent of the parties is not absolutely necessary in marriage contract. An agreement by the father to give his daughter in marriage to another person in consideration of a sum of money to be paid him, is not valid and the father can sue to recover the money if the marriage has taken place². In *Vishvanathan v. Saminathan*³ the court decided that the marriage was in *Asura form*: and the agreement was lawful. In this form of marriage, payment of money by the bridegroom to the bride's parents is allowed⁴. But in Bombay the rule of English Common Law is followed. In *Dholidas v. Fulchand* (1897), 22 Bom. 658, the court held that though the *Asura* form of marriage when actually performed may be recognised as valid, it cannot be inferred that an agreement for such a marriage would be valued and enforceable. Such an agreement conflicts with interest and duty.

The facts showing illegality must be pleaded. The court is bound to notice any illegality which appears in the plaintiff's own evidence or is otherwise brought to its notice even though the illegality is not set up in the pleadings⁵.

Traffic in public offices is opposed to public policy. Statute 49, Geo. III (c. 126, sec. 3) forbids sale and brokerage of public offices and is in force in the Presidency Towns. The Transfer of Property Act IV of 1882, sec. 6 (*h*) enacts that no transfer can be made of property of any kind for an illegal purpose.

The Trusts Act II of 1882 (sec. 3) enacts that all expressions used in this Act and defined in the Contract Act shall be deemed to have the meaning given in the

¹ *Hermann v. Charlesworth*
19 5) 2 K. B. 123, 129.

² *Rannee Lallun Monee*
Dossee v. Nobi Mohun Singh,
1876, 25 W. R. 32. Per Jack-
son J. Per Packe J. 86.

³ 1889, 13 Mad. 83.

⁴ *Strange's Hindu Law*
1 vol. p. 30; *Mayne's Hindu*
Law and Usage sec 80, 7th ed.

⁵ *Code of Civil Procedure*
1908, or 6, r 8

Contract Act. The India Trusts Act (sec. 4) enacts that a trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is : (a) forbidden, by law ; or (b) is of such a nature that if permitted it would defeat the provisions of any law ; or (c) is fraudulent or (d) involves or implies injury to the person or property of another ; (e) or the Court regards it as immoral or opposed to public policy. Every trust of which the purpose is unlawful is void. Where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

The Indian Evidence Act¹ enacts that where the consideration or object of an agreement is alleged to be unlawful, oral evidence may be adduced to prove the same, though the agreement is reduced to the form of a document.

The Specific Relief Act (I of 1877, sec. 35) enacts that any person interested in a contract in writing may sue to have it rescinded. And such rescission may be adjudged by the Court " where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff." *Illustration* : A, an attorney, induces his client B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.

The section 27 of the Indian Contracts Act is copied from the draft of New York Code (sec. 833).

The draftsmen of that Code believed that Contracts in restraint of trade had been allowed to a very dangerous extent and restricted the operation of Common Law. The Common Law was widening in England in the meantime, and the courts considered in every case of restrictive agreement whether the restriction was ' reasonable in reference to the interests of the parties-concerned' Agreements in restraint of trade.

¹ I of 1872, sec. 92, proviso 1.

and reasonable in reference to the interests of the public¹. The court will have regard to the nature and extent of the business to be protected in determining whether the particular agreement in restraint of trade is reasonable or not. It is no longer law to restrict the agreement to a definite area in the place where that business is carried on. "The only true test", said Lord Macnaghten, "in all cases whether of partial or general restraint is the test proposed by Tindal C. J. in *Horner v. Graves*, 7 Bing 735, what is a reasonable restraint with reference to this particular case." In Anglo-Indian Law the section has crippled the growth of commerce by imposing artificial limits.

All agreements in restraint of trade are void, but not illegal². The object of the section is to protect trade. Kindersley J. in *Oakes & Co. v. Jackson*³ said: "Trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained". In Anglo-Indian Law it must be clearly shown that the agreement in restraint of trade falls within one of the exceptions; the test that the restraint is partial and not general is not to be applied. In *Madhub Chunder v. Rajcoomar Doss*⁴ Chouch C. J. "If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money: and the whole contract must be treated as one which cannot be enforced." The parties carried on the business of braziers in a certain place in Calcutta. The plaintiff's mode of doing business interfered with the business of the defendant; the plaintiff agreed to stop his business in that locality if the defendant paid all sums which he had advanced to his workmen. The defendant agreed to pay the sum and the plaintiff ceased to carry on the

¹*Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Co.* (1894), A. C. 535, 565, Per Lord Macnaghten.

²*Harihbai v. Sharafali*, 1897, L. R. 22 Bom. 861

³1876, 1 Mad. 134, 145.

⁴1874, 14 B. L. R. 76, 86

work there. The defendant failed to pay the sum which amounted to Rs. 1,000. The court decided that the agreement was void.

If the parties enter into a contract abroad to be performed in India and it violates the terms of the sections, the contract will not be enforced by Indian courts. In *Oakes & Co. v. Jackson*¹ it was decided that if an agreement in restraint of trade be made abroad, to be performed in India, the agreement is void.

Anglo-Indian Law is very strict with regard to agreements in restraint of trade ; many agreements which are perfectly valid according to the Common Law of England are invalid in British India ; and the courts are bound to decide cases according to the term of this section. Jenkins² C.J. said : " So far as restraint of trade is an infringement of public policy, its limits are defined by section 27."

The first exception to the rule is the result of a great dislike of combinations tending to raise prices. In *Hilton v. Eckersley*³ it was held that ' no power short of general law, not even the express wishes of the parties can restrain a man's choice as to the way in which he shall carry on his trade. In *Nordenfelt's* case Lord Macnaghten discussed the rule of the Common Law. In the 16th century restrictions ' for a time certain and in a place certain ' were introduced in order to prevent the seller of a business from competing with the buyer. In the 19th century the rule as to time limit was considered quite unnecessary and contracts made with a view to preserve trade secrets were excluded from the rule. In *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Co.*⁴ the House of Lords decided (1) that the covenant not to compete with the Company in any business which it might carry on was a general restraint of trade, it was unreasonably wide and therefore void. (2) that the sale of a business accompanied by an

¹ 1876, 1 Mad. 134.

29 Bom, 107, 120.

² *Fraser Co. v. The Bombay Ice Manufacturing Co.* (1905),

³ (1856), 6 E, and B 47, 64.

⁴ 1894 A. C. 535

agreement by the seller to retire from the business was not void if it was reasonable between the parties and not injurious to the public. The question of reasonableness is for the Court and not for the Jury¹.

Agreements between partners are usually made with a view to prevent the retiring partner from competing with other partners ; it is valid in British India and in England.

Agreements
in restraint
of legal
proceedings.

Every agreement by which any party thereto is restricted *absolutely* from enforcing legal rights is void. If any provision is made to refer disputes to arbitration, it is binding. The general rule of English Law which prohibits all agreements purporting to oust the jurisdiction of the courts² is followed in Anglo-Indian Law. If the agreement to refer to arbitration is broken, there are three remedies open to the party :

- (1) To sue for the breach ;
- (2) To have the agreement specifically performed;
or
- (3) When sued to plead that the agreement is violated.

Agreements
by way of
wager.

Section 30 of Act X of 1872 and the Bombay Presidency Act III of 1865 represent the whole law of wagering contracts in British India. Before 1848 the law about wagers in India was the Common Law of England, which declared that an action might be maintained on a wager if it was not against the interests or feelings of third parties, and did not lead to indecent evidence and was not opposed to public policy³.

‘Gaming either with inanimate or with animate things, let the king exclude wholly from his realm. Such play with dice and the like, or by matches between rams and cocks, amounts to open theft’⁴.

¹Dowden v. Pook, 1904, 1 K. B. C. A., 45.

³Rughoonath v. Manik-chund, 1856, 6 M. I. A. 251.

²Anant Das v. Ashburner Co., 1876, 1 All. 267. (F. B.)

⁴Manu, ch. VIII, secs. 221, 222.

Anson¹ defines wager as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event ; the consideration for such a promise is either something given by the other party to abide the event, or a promise to give upon the event determining in a particular way. The parties must contemplate the determination of the uncertain event as the sole condition of the contract. One may thus distinguish a general wager from a conditional promise or a guarantee. In *Dayabhai Tribhovandas v. Lakhmichund Panachand*² Birdwood J. said : " If one of the parties has ' the event in his own hands,' the transaction lacks an essential ingredient of a wager." Jenkins³ C. J. said: "Each side should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken." In *Alamai v. Positive Government Security Life Assurance Co., Ltd.*⁴ Fulton J. discussed the meaning of the words 'agreements by way of wager' and held that the words 'agreements by way of wager' as used in the section, have the same meaning as the words 'agreements by way of wagering' in England. In *Hampden v. Walsh*⁵ Cockburn J. defined a wager to be a contract by one person to pay money to another if a given event happened, if that other gave money to him in consideration of that event not taking place. In *Thacker v. Hardy*⁶ Cotton C. J. decided that a bet on the price of stock at a future day may be a wager. The essence of wager was that one party was to lose and the other to win upon a future event, which event at the date of the contract was quite uncertain. Anson⁷ writes : " It is not that one is and the other is not a wager : a bet is not less a bet because it is a hedging bet ; nor yet because the stake is limited to the amount of loss sustained ; it is the fact that the

¹Contracts, pp. 209-210, 12th ed.

²1885, 9 Bom. 358, 363 per Birdwood J.

³Sassoon v. Tokersey (1904), 28 Bom. 616, 621.

⁴1898, 23 Bom. 191.

⁵1875, 1 Q. B. D. 189.

⁶1878, 4 Q. B. D. 685, 695 Per Cotton, L. J.

⁷Contract, p. 211. (12th ed)

law permits the one kind of contract and does not permit the other, which makes the distinction between the two." The distinction lies more in the intention of the parties than in the form of the contract. In *Kongyee Lone & Co. v. Lowjee Nanjee*¹ Lord Hobhouse decided that the words 'gaming and wagering' used in the English Act and the Act of 1848, and the words 'by way of wager' used in sec. 30 of Contract Act mean the same thing. English decisions are good law in India on this subject. If money be lent for gambling in a country where the gambling is not unlawful, it can be recovered in an English Court. In *Moulis v. Owen* (1907) 1 K. B. 746, 750, 757 it was decided that money so lent could not be enforced. While *Saxby v. Fulton*² decided that money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English Courts.

An agreement to pay differences in stock with or without terms to complete purchases is a type of wagering contract³. The Court can examine the real nature of the agreement as a whole. Neither party should intend to perform the contract itself but only to pay the differences⁴. Both contracting parties must intend at the time of making the contract under no circumstances to call for or to give delivery from or to each other⁵. Batchelor J. said: "The court must take the widest possible outlook consistent with the provisions of the Indian Contract Act: otherwise it would be that the statute could be violated with impunity by the simple

¹(1901), 28 I. A. 239, 244;
Dady v. Madhuran, (1903),
5 Bom. L. R. 768 Per
Batty J.

²(1909) 2 K. B. 208, 224,
230, C. A., following Quarrier
v. Colston (1842) 1 Ph. 147.

³Doshi Talakshi v. Shah
Ujamsi Velsi (1889), 24 Bom.
227, 232.

⁴*Re Gieve*, 1899, 1 Q. B.
794, 798 C. A. Per Lindley
M. R.

⁵*J. H. Tod v. Lakhmidas*
1892, 16 Bom. 441, 445, Per
Farran J.; *Ajudhia Prasad*
v. Lalman (1902), 25 All. 38;
Motilal v. Govindram (1905),
30 Bom. 83, 90 Per Batchelor
J.

and habitual devise of cloaking wagers in the guise of contracts." Davar J. said : " The expression ' under no circumstances ' is too much wide and if the words of Justice Farran were to be taken too literally, they would render the provisions of contract (sec. 30 of the Contract Act) more or less nugatory. The court must ascertain the true nature of the dealings between the parties by probing into surrounding circumstances and minutely examining the position of the parties and the general character of the business carried on by them¹.

The section allows a broker or an agent to sue his principal for commission or losses sustained on his behalf, even though the agreement in respect of which the action is brought was void by reason of wager². In the Bombay Presidency Act III of 1865 was passed to supply this defect. So in Bombay : (1) All contracts, whether by speaking, writing or otherwise knowingly made, to further or assist the entering into or carrying out of agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void ; and no suit shall be allowed in any Court of Justice for recovering any sum of money paid or payable in respect of any such contract or contracts or any such agreement or agreements as aforesaid.

(Sec. 2) : " No suit shall be allowed in any Court of Justice for recovering any commission, brokerage fee, or reward in respect of the knowingly effecting or carrying out or of the knowingly siding in effecting or in carrying out, or otherwise claimed or claimable in respect of any such agreements, by way of gaming or wagering."

A deposit paid on a wagering contract cannot be recovered under the Bombay Act III of 1865, or section 65

¹Hurmukhrai v. Narotam- 1911, 27 T. L. R. 212 C. A.
das (1907), 9 Bom L. R. 125, ²Bhola Nath v. Mul-
136, 137 Wilson v. Coholly chand, 1903, 25 All. 639.

of the Contract Act. The agreement to pay differences to the knowledge of both of them must be presumed to have been known to be void. Sec. 65 runs as follows :

“ When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it.”

In Anglo-Indian Law a collateral agreement to a wagering contract is not valid except in the Bombay Presidency. In England that was the law before the Gaming Act of 1892¹.

In the *Universal Stock Exchange, Ltd., v. Strahan*² a term on the contract that either party might at his option require completion of the purchase was inserted, but the real intention of the parties was to pay in differences. Such a term was inserted only to ‘ cloak the fact that it was a gambling transaction and to enable the parties to sue one another for gambling debts.’ In *Doshi Talakshi v. Shah Ujemsi Velsi Jenkins* C. J. said: “ The law says that we must find, as best we can, the true intention of the parties ; we must not take them at their written word, but must probe among the surrounding circumstances to find out what they really meant.”

In England the Statute 14 Geo. III (c. 48) enacts that a policy of insurance on the life of a person in which the insurer has no interest is void. Insurance is forbidden by the Act on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest nor by way of wagering or gaming. This statute is not extended to India.

The agreement by way of wager is void, and no suit will lie on any promissory note for a debt due on a

¹ 55 Vict. c. 9.

² 1899, 24 Bom. 227.

³ 1896, A C. 166

wagering contract. The note is made without consideration. It is not an illegal contract. If money is lent for gaming purposes or to enable the defendant to pay debts incurred in gambling, such loan can be recovered.

The Indian Penal Code (sec. 294-A) makes it a crime to keep any office or place for the purpose of drawing a lottery which is not authorised by the Government of India; it also makes it an offence to publish any proposal to pay money or to deliver goods, etc., on any event or contingency relating to drawing any lot or ticket in such lottery. A lottery ordinarily understood is a game of chance in which the event of gain or loss wholly depends on drawing or casting lots; the effect of such game of chance is to beget a spirit of rash speculation.

Anglo-Indian Law differs from the Common Law of England. In England agreements relating to impossibility are governed by reference to the intention of the parties. Agreement to do impossible acts.

A contract to do an Act impossible in itself is void. This is also the law of England. If the parties agree to do an act which is obviously impossible, he cannot be serious, and therefore a promise to do such an act is without consideration. 'Impossible in itself' means impossible in the nature of things.

A contract to do an act which after the contract is made becomes impossible or unlawful by reason of some event which the promisor could not prevent, becomes void. The rule of English Law is that if a person promises to do an act without any qualification he is bound by the terms of the contract. The parties are quite free to qualify their promises. The condition need not be expressed; it can be implied from the nature of the act. The event which makes the act impossible may be 'of such a character that it cannot be reasonably supposed to have been in contemplation of the contracting parties when the contract was made.'

*Baily v. De Crespigny*¹. The promise is discharged without the fault of the promisor on two grounds : (1) if the performance is rendered impossible by law, and (2) if the event which the parties took for granted as the basis of the contract did not exist or had ceased to exist². In *Krell v. Henry*³; the defendant agreed to hire the plaintiff's flat for June 26 and 27. There was no reference in the contract to the Coronation procession, but it was announced that it would pass by that flat. The rent had not become payable when the procession was abandoned. Held, the plaintiff could not recover. Vaughan Williams L. J. said: "The principle is not limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of something, which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but if required from necessary inferences drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. In *Robinson v. Davidson*⁴ the promise was to perform something in person, and the promisor died or was disabled by some infirmity.

If a person agrees to answer for the voluntary act of a third person and does not use any qualifying words, he must be liable if that third person does not fulfil the promise⁵.

The Specific Relief Act of 1877 (sec. 13), enacts that notwithstanding anything contained in sec. 56 of this

¹(1869) L. R. 4 Q. B. 180, Per. Vaughan Williams, L. J. 185, 186.

²*Taylor v. Caldwell* (1863) 3 B. and S. 826, 834, Per Blackburn J. ³1871, L. R. 6. Ex. 269, 275.

⁴*Rangasawmi v. Trisa Maistry* (1907), 17 Mad L. J. 37.

⁵(1903.) 2 K. B. 740, 749.

Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

The Transfer of Property Act, IV of 1882 (sec. 108 cl. (e)) enacts as follows : if by fire, tempest or flood or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially, and permanently unfit for the purposes for which it was let, the lease shall at the option of the lessee, be void.

Section 65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it¹. Failure of Consideration.

Section 64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit hereunder from another party to such contract, restore such benefit so far as may be to the person from whom it was received.

An agreement not enforceable by law is said to be void. ‘Void’ Voidable’, &c.

An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. (Sec. 2 (g), (i) j)).

There is a distinction drawn between agreement and contract in the Act. Section 10 deals with the elements necessary to constitute a valid contract. Absence of any of the elements (*viz.* free consent of the parties, lawful consideration, a lawful object and ‘not hereby expressly declared void’) makes the agreement void ; if there are certain defects, the contract will be voidable.

¹ Gulabchand v. Fulbai. 417, 418 Per Sir B. Scott (1909) I. L. R. 33 Bom. 411, C. J., and Batchelor J.

If the agreement is voidable, one of the parties has the option to one of three things : (1) to maintain the action on the contract; (2) to rescind it or resist its performance; or (3) to sue to set it aside.

Voidable contracts are of two kinds: (1) The contracts voidable in their inception on the ground of fraud, etc., are the following :—

Section 19. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is voidable at the option of the party whose consent is so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Section 19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

And such contract may be set aside either absolutely or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just¹.

(2) The contracts becoming voidable by subsequent default of one party are the following :—

Section 39. When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract unless he has signified by words or conduct his acquiescence in its continuance.

¹*Poma Dongra v. Willims* 31 Bom. 348. 352 Per Davar J. and *Balkishan Das v. Madan Lal* (1907) 29 All 303.

Garth C. J. in *Sooltan Chund v. Schiller*¹ said :
 “ This section only means to enact what was the law in England and the law here before the Act was passed”, viz., where a party to a contract refuses altogether to carry out his promise, or is disabled from performing his part of the promise, the other side has a right to rescind it². The words ‘ his promise in its entirety ’ mean the substance of the promise taken as a whole. The framers of the Act contemplated that the vital part of the contract was to be considered³.

Sir Basil Scott⁴ C. J. said: “ Before the passing of the Indian Contract Act wherever a Consideration was executed for which a debt was payable at the time of action had accrued due either under an express promise or under one implied by law, the debt might be sued for in an *Indebitatus Count* (Bullen and Leake’s *Precedents of Pleadings* 2nd ed., p. 29) ; thus the Count lay where the Consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case both in England and Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages.”

“ I take it, therefore, that the section 128 of the Code of Civil Procedure, 1908, we have legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.”

¹1878. 4 Cal. 252, 255.

²*Cutter v. Powell* 2 S.L. Cases, p. 9 and notes. (11th ed.)

³*Withers v. Reynolds*. 1831, 2 B. and A. 882 Finch Selected Cases 712.

Freeth v. Burr (1874) L. R. 9 C. P. 208, 213 Finch. Se.

C. A. 714: *Mersey Steel and Iron Co. v. Naylor, Benzon and Co.* (1884), 9 A. C. 434, 442 : *Rash Behary Shaha v. Nrittya Gopal* (1906), 33 Cal. pp. 477, 481. Per Maclean C. J.

⁴*P. R. & Co., v. Bhagwandas*, I. L. R. (1910) 34 Bom. pp. 192, 197, 198.

“The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands.”

Disability which is brought about by the fault of the party himself is quite different from inability to perform a contract. The Specific Relief Act 1 of 1877 (sec. 14), refers to the effect of the inability of a party to perform the whole of his part of a contract, while sec. 24 (b) enacts that specific performance of a contract cannot be enforced in favour of a person who has become incapable of performing any essential term of a contract that on his part remains to be fulfilled. If a promisor disables himself from performance before the time appointed to carry out the promise arrives it is regarded as a breach. Anson¹ says: “If A before the time for performance arrives makes it impossible that he should perform his promise, the effect is the same as though he had renounced the contract²”. In *Frost v. Knight*³ the effects of anticipatory breach were considered by Cockburn. He said: “The promisee if he pleases may treat the notice of intention as inoperative, and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.” In *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas*⁴ it was held that the declaration by the girl, who was engaged to marry the plaintiff that she was unwilling to be married for three or four years was practically a repudiation of the

¹Contracts, p. 321 (12th ed). *of England*, vol. III. 548

²*Lovelock v. Franklyn* 8 (2nd ed).

Q. B. 371 and *Synge v.* ³1872 L.R. 7 Ex 111, 114.

Synge, (894), 1 Q. B. P 466, Per Cockburn C. J.

469. *Encyclopædia of Laws* ⁴1897 21 Bom. 23.

agreement to marry and the Court decided that the plaintiff should be awarded damages for the breach of the agreement.

Section 53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented ; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Section 55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failures.

The English rules on the subject of failure of Consideration are technical and are very closely connected with the ancient system of pleading. That system of pleading is now abolished in England.

In Smith's *Leading Cases* the question is discussed whether an action will lie by a person who has entered into a special contract against the other contracting party while his own side of the contract remains unperformed¹.

The plaintiff must do his part on the original contract or on some other implied contract. In *Appleby v. Myers*² Blackburn J. said: "Where a party has agreed

¹L. S. L. C. 10, 17.

Per Blackburn J.

²1867, L. R. 2 C. P. 651, 658

to do an entire work for a certain sum, he can recover nothing, unless the work be done or it can be shown that it was the defendant's fault that the work was incomplete or that there was something to justify the conclusion that the parties have entered into a fresh contract."

The English.
rule.

The English rule is that if a contract becomes impossible of performance owing to the loss or destruction of the subject-matter or the failure of the object which was the basis of the contract, the parties are excused from further performance, and each party must bear the loss or expense already undertaken. And no action will be allowed to recover any money paid in advance, *Elliott v. Crutchley*¹. Anglo-Indian Law does not give any special rule on this point, but is determined by sec. 56. On the other hand each party is bound to return any payment received.

RULE VI.—A Promise to compensate, wholly or in part, a person who has already voluntarily done something for the Promisor or something which the Promisor was legally compellable to do is valid, even though it is made without Consideration, (sec. 25 (2)).

If an agreement is expressed in writing and registered under the Registration Act III of 1877, and is made on account of natural love and affection between the parties standing in a near relation to each other, it will be valid even though it is made without Consideration (sec. 25 (1)).

In English Law the performance of what one is already bound to do is no Consideration at all for the promise; a promise of performance cannot be a Consideration, because it adds nothing to the obligation already existing. There must be a legal duty; if there is no legal duty, any promise made to induce one to do

¹1906 A. C., p. 7, 8. Per Lord Halsbury L. C.

the work will not be valuable Consideration¹. But if a person is under a legal duty to do a certain thing, any promise to make him do something more than he is legally bound to do is a valuable Consideration for the promise. In England *v. Davidson*² the Court held that the constable had done something more than his legal duty and was entitled to the reward.

This rule as to Consideration also applies to cases of sale and mortgage of immovable property. In *Manna Lal v. Bank of Bengal*³ it was decided that a mortgage effected by a duly registered deed was void for want of Consideration. The Transfer of Property Act (sec. 4) enacts that provisions as to Consideration apply to that Act also.

The English rule is that the promise and Consideration must be co-existent⁴. The Anglo-Indian Law deliberately departs from the English rule.

An act voluntarily done must have been for the promisor (not at his request). Section 24 refers to cases where the act is done at the desire of the promisor. Farran C. J. in *Sindha v. Abraham*⁵ said the section appeared to cover cases where a person without the knowledge of the promisor or otherwise at his request, did the latter some service and the promisor undertook to recompense him for it. In *Dhiraj Kuar v. Bikramajit Singh*⁶ it was decided that a promise to pay a woman an allowance for past service is equivalent to a promise by the defendant to compensate the plaintiff for service voluntarily done to him. In *Beaumont v. Reeve*⁷ it was decided that a bond given in Consideration of past immoral conduct would be binding if under seal; a negotiable instrument given on immoral Consideration would be invalid but not illegal.

¹*Indran Ramaswami v. Anthappa Chettiar* (1906) 16 M. L. j. 422, 426.

²1840, 11 A. and E. 856. Per Lord Denman C. J.

³1876, 1 Afl, 309.

⁴*Anson, Contracts*, p. 116.

⁵1895, 20 Bom. 755, 757, 758.

⁶1881, 3 All. 787.

⁷1846, 8 Q. B. 483.

Anglo-Indian law does not attach any sanctity to a deed, as does English Law, and insists on having Consideration in every case except in the case of a registered writing executed with the motive of natural love and affection between near relatives. In *Jafar Ali v. Ahmad Ali*¹ it was held that the relationship of cousins would not support a voluntary agreement, even though it was registered. The Common Law of England does not regard any degree of kinship, however close. If a Mahomedan husband enter into agreement with his wife to give all his earnings to her and register it, the Court will enforce that agreement. If a member of an undivided Hindu family agree with his co-parceners in writing and register that agreement to renounce without any Consideration his share in the joint property, it will not be valid unless it was made on account of natural love and affection between the parties standing in a near relation to each other.

A promise made in writing and signed by the person to be charged therewith, or by his agent, to pay a debt in part or wholly which the creditor was entitled to recover but for the Statute of Limitation is a contract, and will be enforced. The rule of English Law is similar². Westropp C. J. in *Tillackchand v. Jitamal*³ said: "The general rule of law is that a Consideration merely moral is not valuable Consideration such as would support a promise, but there are some instances of promises which were formerly supported on the principle of previous moral obligation. Those cases are still binding on different grounds. A promise after full age to pay a debt contracted during infancy and a promise in writing in renewal of a debt barred by the Statute of Limitations are examples. A person may renounce the benefit made for his protection.

¹1868, 5 B. H. C. A. C. J. C. 603.

37, 39.

²1873, 10 B.H.C. 206, 214 ;

³Notes to *Tanner v. Smart* Chandraprasad v. Varajlal (1827) 30 R. R. 461, 6 B. and (1906) 8 Bom. L. R. 644, 647.

RULE VII.—Every Promisee may dispense with or remit wholly or in part, the Performance of the Promise made to him or may extend the time for such Performance or may accept instead of it any satisfaction which he thinks fit¹.

Illustrations : (i) *A* owes *B* 5,000 rupees. *A* pays *B* and *B* accepts in satisfaction of the whole debt 2,000 rupees paid at the same time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(ii) *A* owes *B* 5,000 rupees. *C* pays *B* 1,000 rupees, and *B* accepts them, in satisfaction of his claim on *A*. This payment is a discharge of the whole claim. Where a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promiser². In English Law the discharge of contract must be by a third person authorised by the debtor. In Anglo-Indian Law it may be by a third person, whether authorised or not. The Negotiable Instrument Act XXVI of 1881 (sec. 113) has a similar rule.

(iii) *A* owes *B* under a contract a sum of money, the amount of which has not been ascertained. *A*, without ascertaining the amount, gives *B*, and *B* in satisfaction thereof accepts the sum of 2,000 rupees. This is a discharge of the whole debt whatever may be its amount.

Anglo-Indian Law departs from the rule of English Law on this point. According to the English rule, writes Leake³: “It is competent for both parties to an *executory contract*, by mutual agreement without any satisfaction, to discharge the obligation of that contract.” Reciprocal discharges are sufficient Consideration for each other. “But an executed contract cannot be discharged except by release under seal or by performance of the obligation.” But in Mercantile Law, if obligation is incurred by a negotiable instrument, it

¹The Indian Contract Act.
(IX of 1872) sec. 63.

²*Ibid.* sec. 41.

³*Contracts* p. 563.

may be discharged by waiver¹. The new agreement in rescission or alteration of a prior contract generally satisfies the requirements of an independent contract². The form of pleading was that the plaintiff had discharged the defendant. But to succeed on this plea the defendant had to show an agreement.

As a general rule the Courts do not inquire into the adequacy of Consideration; if anything different in kind from what is due be given, it will be a good satisfaction. But the Court must know that a less sum of money cannot be equivalent to a larger sum due. In *Foakes v. Beer*³ the House of Lords confirmed the above rule⁴. If a Negotiable Instrument be given for the same or even a less sum, it will be a good discharge because the creditor does not regard the instrument as money. Anglo-Indian Law is different from English Law on this point⁵.

The Indian Negotiable Instrument Act, 1881, sections 82, 90, deals with discharge from liability on negotiable instruments.

Forbearance to sue is valuable Consideration, because the promisee suffers detriment. To give up the exercise of one's own legal right at the request of the promisee is of some value in law. An agreement to forbear prosecuting a claim or actual forbearance at the request of the promisee for a time is valuable Consideration.

RULE VIII.—When at the desire of the Promisor the Promisee or any other person abstain from doing something, such abstinence is a Consideration⁶.

Compromise of doubtful rights is an instance of forbearance. In *Miles v. New Zealand Alferd Estate Co.*⁷ Bower L. J. said: "If an intending litigant *bona fide*

¹Bills of Exchange Act, 1882 (sec. 62); *Foster v. Dawber* (1851) 6 Ex. 839, 850 Finch, *Select Cases on Contract*, 678.

²*King v. Gillett*, 1840, 7 M. and W. 55, 56.

³1884, 9 A.C. 605, Finch, *Selected Cases*, 319.

⁴*Cumber v. Wane* 1 S. L. C. 325 and notes to that case; *Foakes v. Beer* 9. A. C. 605, 612 615, 622.

⁵*Naoroji v. Kazi Sidick* 1896, 20 Bom. 636, 649.

⁶*Contract Act*, sec. 2 (d).

⁷1886, 32 ch. Div. 266, 291

forbears a right to litigate a question of law or fact, which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage which a suitor is capable of appreciating, to be able to litigate his claim even if he turns out to be wrong." This principle has been accepted in Anglo-Indian Law. In *Girijanund v. Sailajanund*¹ there was a compromise of a *bona fide* dispute about a right of succession to a priestly office. Held, the compromise was binding.

In Hindu and Mahomedan Law all kinds of compromise are lawful².

RULE IX.—When at the desire of the Promisor, the Promisee or any other person has done, or abstained from doing, such act or abstinence or Promise is called a Consideration for the promise³.

If *X* does any act at the request of *Y*, without any promise being given by *Y*, it will be a Consideration for a subsequent promise of *Y* to *X*. The rule of English Law is that to make a binding contract Consideration must be given and accepted in exchange for the promise at the same time. A subsequent promise cannot create an obligation, but such a promise may be regarded as evidence of bargain fixing the reasonable recompense on the faith of which the service was rendered. Anglo-Indian Law has accepted the rule laid down in *Lampleigh v. Braithwait*⁴ and holds that "a mere voluntary courtesy will not have a Consideration to uphold an *assumpsit*"; but if the service was "moved by a suit or request" of the promisor, the promise "couples itself with the suit before."

A promise made in writing and signed by the party to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in

¹1896, 23 Cal. 645.

³*Contract Act*. sec. 2 (d).

²Manu, ch. VIII; Baillie, Vol. I Book VII; Koran, Book IV. 127.

⁴1615, Hobart, 105; 1 S.L.C. 141.

part a debt of which the creditor might have enforced valid payment but for the limitation of suits is a contract (sec. 25 (3)).

If a party is already bound to do a certain thing under a contract for another, there is no Consideration for doing that very thing or for a promise to do that very thing without any additional burden or any variation in that promise. An interesting question may arise if a stranger offers a promise to the contracting party to perform that obligation. Pollock and Anson¹ have discussed the question. The Indian Contract Act is silent on the point. English authority is in favour of the view that the performance constitutes good Consideration². The test is: Has the promisee suffered any detriment ?

If any addition be made to the performance already contracted for, it will be a valuable Consideration and will remove this perplexity.

RULE X—A Contract may be formed by the exchange of mutual Promises, each Promise is Consideration for the other.

Neither promise is of any value if taken by itself, but becomes Consideration owing to the exchange of promise of the other. It is not a logical deduction from the view of Consideration, but the result of a particular system of law. It is the result of convenience in civilised countries. In early societies obligation does not arise to carry out a promise until the other party has performed his promise by doing some act. The Anglo-Indian Law assumes throughout that mutual promises are Consideration; every promise or every set of promises forming the Consideration for each other is an agreement. Promises which form the Consideration or part of the Consideration for each other are called

¹Anson Contracts, p. 110 (12th ed); Pollock on Contracts (7th ed) 186—190; Leake on Contracts (5th ed) 436, 437.

²Shadwell v. Shadwell, 1860, 9 C. B. N. S., 159; Scotson v. Pegg, 1861, 6 H. and N. 295; Finch, *Selected Cases*, 333.

reciprocal promises¹. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise². The rule in English Common Law is similar. In construing the words 'to be simultaneously performed,' the intention of the parties must be gathered from the whole³ agreement. In *Kingston v. Preston*, cited in *Jones v. Barkley*³ Lord Mansfield held that 'the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties.' Lord Kenyon in *Morton v. Lamb*⁴ decided that, 'whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which several things are to be done.'

In Hindu Law an action lies for breach of promise of marriage as in English Law. Marriage is not a civil contract but a sacrament. Manu says: "Neither ancients nor moderns who were good men have ever given a damsel in marriage after she has been promised to another man⁵. Narada and Yajnavalkya both admit the right of the father to annul a betrothal if a better match presents himself⁶. In British India a suit will be for damages only⁷.

In Mahomadan Law marriage is a civil contract founded on the intention of legalising the ensuing generation⁸. There is no right of action for breach of promise of marriage .

¹Contract Act, sec. 2 (e) and (f)

²*Ibid.* sec. 51.

³1773, Doug. 684, Finch, Selected Cases, 735.

⁴1797, 7 T. R. 125; Finch, S.C. 741.

⁵Ch. IX, sec. 90.

⁶Narada, XII. secs. 30-38; Mitakshara II. 11. sec. 27.

⁷Specific Relief Act. 1 of

1877, 1 21 cl. (b) Illustration Mayne's *Hindu Law*, sec. 95, ed. 1900; Bannerjee, *Marriage and Stridhan*. pp. 86—88 Tagore Lectures, 2nd ed.

⁸Macnaghten's *Mahomadan Law*, p. 56; Hedaya, 25.

²Amir Ali, *Mahomadan Law*, 2nd ed. 1894, Vol. II. 298.

RULE XI.—There is no Instrument in the Nature of a Deed. Every Instrument must have Valuable Consideration¹.

The English doctrine is that a deed by its solemnity is sufficient to make a binding promise. There must be valuable consideration in every case. There is no instrument in the nature of a deed in Hindu, Mahomadan or Anglo-Indian Law. In Hindu Law if a contract is concluded by mutual assent, the written memorandum must be attested by three witnesses. If the document is in the handwriting of the party himself, no subscribing witnesses are required; if it is in the handwriting of another person, it must be attested by at least three witnesses².

Inadequacy by itself is not a bar even to specific performance in Anglo-Indian Law³. English cases are not quite consistent⁴. The inadequacy of consideration may be evidence that the promisor did not give his consent freely and voluntarily. An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the Court may take into consideration its inadequacy in determining the question whether the consent of the promisor was freely given⁵.

B.—THE DOCTRINE OF CONSIDERATION AS IT AFFECTS THE LAW OF PROPERTY AND CONVEYANCING.

In Anglo-Indian Law the subject of property is dealt with in the Transfer of Property Act IV of 1882 and the Trusts Act II of 1882. The provisions of the Contract Act are expressly made applicable to these Acts.

¹Contract Act, sec. 25. 1877, sec. 28 (a).

²Colebroke, *Digest of Hindu Law*, sec. 16.

⁴Pollock, *Contract*, 60.

³Specific Relief Act I of 2.

⁵Contract Act, sec. 25, exp

RULE I.—The Presence or Absence of consideration changes the legal nature of the Transaction.

A gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the life-time of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void¹.

The Anglo-Indian Law of gifts requires that the donee must be in existence and acceptance must take place during the donor's life-time. In English Law acceptance is presumed. Delivery is not essential to complete a gift. Acceptance is enough.

In Hindu Law a gift is completed: (a) by giving orally or in writing with intention on the part of the donor to pass the property to the donee; and (b) by the donee accepting the gift in the donor's life-time². The donee must be in existence actually or in the contemplation of law at the time of the gift. A voluntary promise cannot be enforced, though the voluntary act, when completed, is irrevocable³. Vajnavalkya II, 176, says acceptance of a gift should be public especially of immovable property. The author of Mitakshara⁴ discusses the whole subject. The Transfer of Property Act IV of 1882, section 122 follows the rule of Hindu Law. Vrihaspati says: "Things once delivered on the following eight accounts cannot be resumed; the pleasure of hearing poets, musicians or the like, the price of goods sold, a nuptial gift to a bride or her family, an acknowledgment to a benefactor, a present to a worthy man, from natural affection or from friendship. What is given by a person in wrath or excessive

¹Transfer of Property Act, p. 426.
sec. 122.

²Mayne's *Hindu Law*, 6th ed., 1900, sec. 375.

³2 Strange, *Hindu Law*,

⁴III. secs. 5 and 6 trans.
by W. Macnaghten 1 W. Mc
N. 212, 217.

joy, or through inadvertence, or during decease, minority or madness, or under the influence of terror, or by one intoxicated or extremely old, or by an outcaste or an idiot, or by a man afflicted with grief or with pain, or what is given in sport ; all this is declared ungiven or void. If anything be given for a consideration unperformed, or to a bad man mistaken for a good man, or for an illegal act, the owner may take it back¹.” The Transfer of Property Act IV of 1882, section 126, deals with the revocation of gifts.

The rule of Anglo-Indian Law applies to Hindus only. A gift is regarded as a contract because it is a transaction requiring the assent of the parties concerned. This is not the true view of the English Law of gift, because as soon as the donor has transferred his property to the donee, it vests in him, subject to his dissent. The positive assent of the donee is not required in English Law. The absence of dissent makes the gift complete.

In English Law there may be two persons having different estates in the same property. Both are entitled to convey their estates, both are entitled to the rents and profits, one, the legal owner to receive them ; the other, the equitable owner, to enjoy them. This concurrent existence of two systems of jurisprudence is unknown to Hindu Law. Peacock C. J. said: “ Hindu Law makes no provision for trusts. There is nothing in Hindu Law at all analogous either to the trusts of English Law or the *fidei commissa* of Roman Law²”. Markley J. said: “ There is no trace of it in any passage or any work on Hindu Law. There is no indication of it in the habits of the people³”. The Indian Trusts Act I of 1882, regulates questions of trusts among Hindus and Mahomedans.

¹ 2 Dig. 174 197, Manu, VIII, ss. 721, 213.

² Kumara Asima v. Kumara Kumara.

³ 2 Bengal L. R. O. C. 1136.

³ S. M. Krishnamani v. Anand Krishna Dass 4 B. 2 R. O. C. 231, 245, 247 Tagore Law Lectures, by Agnew, 1881, pp. 8, 9.

A gift differs from trust because a mere agreement to give being without a valuable consideration is void unless it be in writing registered and made on account of natural love and affection between the parties standing in near relation to each other¹. The Court does not assist a volunteer. The owner may transfer his property by way of gift, by means of declaring a trust; he may either declare himself a trustee for the donee or may appoint some third person to act as a trustee for the donee. He may do such acts as amount in law to a conveyance or assignment of legal ownership in favour of the *cesti que* trust².

In Mahomadan Law there is no idea of trust in the English sense of the term; also the idea of legal and equitable ownership is unknown³.

Waqf is detention and is completed by tying up the *corpus* of property in perpetuity for charitable and public purposes; only the *corpus* is to be used. The ownership is in God and becomes vested in Him. The usufruct is to be used for human beings⁴. The chief elements are detention in perpetuity; (2) some definite property; (3) charitable or religious uses or public utility. Indian Trusts Act II of 1882, does not apply to *waqfs* (sec. 1). Family settlements can be made by way of *waqf*. 'There must be substantial dedication of the property to religious or charitable uses at some period of time or other⁵'. The beneficiaries may be a limited class of men, *e. g.*, descendant of the donor. The Privy Council doubted if descendants could be a limited class⁶. Charity in Mahomadan Law means more than in English Law. Any good act is charity⁷. All

¹The Indian Contract Act, 358—363.
IX of 1872, s. 25 (1).

²The Indian Trusts Act. II of 1882, secs. 6 and 7.

³The Principles of Mahomadan Law by Faiz B. Tyebji (1913), pp. 299-300.

⁴*Hedaya*, Vol. 5, pp. 416—422 Principles of Mahomadan Law by F. B. Tyebji, pp.

⁵Shaikh Mahomad A. Chowdhry *v.* Amarchand Kundu, 17 I.A.—28, 37.

⁶Abdul Fata *v.* Rosamaya I. L. R. (1894) 22, Cal. 619, 630. 22 I.A. 76 Per Lord Hobhouse

⁷Amir Ali, *Mahomadan Law*, Vol. 1, p. 190 (3rd ed.).

schools of Mahomadan Law are unanimous that *waqf* to one's own family is good. The Privy Council have interpreted the word 'charity' in the English sense, excluding donor's children and kindred from objects of *waqf*. But if grant to charity is substantial and not merely shadowy, provision to provide for the members of the settlor's family for a period which must come to an end will be regarded as valid. The primary object of *waqf* must not be "aggrandisement of settlor's family" and dedication to religious or charitable objects must be genuine. The gift to a charitable or religious use may be merely colourable if the settlor leaves a nominal or uncertain amount and the benefit to the religious object is remote. The validity of *waqf* is founded on the Koranic text: "Tie up the property and devote the usufruct to human beings. It is not to be sold or made the subject of gift or inheritance. Devote its produce to your children, your kindred and the poor in the way of God."

A universal gift can be made also. Where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein. In Hindu Law the general rule is that if gift of property is made without express words of inheritance, the donee acquires an absolute estate¹. But the above rule is not to be applied when the donee is a woman taking from her husband. When property is given by a Hindu to his wife, it must ordinarily be understood to be given subject to her personal law, that is, the intention was to give her woman's estate. 2 Indian Appeal, p. 7, Transfer of Property Act, chapter 2, is not intended to make any change in Hindu Law².

In Mahomadan Law a gift consists in a transfer of property made immediately and without giving any exchange. The term exchange is equivalent to the word consideration in English Law and *ewaz* in Arabic.

¹Tagore v. Tagore, 9 Beng. I. L. R. (1911) 35 Bom. 279, L. R. 377, 394, 399. 284.

²Motilal v. A. G. of Bombay.

When no *ewaz* is given it is called *hiba*; when Consideration is given it is called *hiba-bil-ewaz*¹. The main idea in alienation in Mahomadan jurisprudence is corporal delivery of the thing by its owner to another. To constitute a valid gift there must be (a) declaration of this gift by the donor; (b) acceptance of the gift by the donee; (c) delivery of possession to the donee by the donor².

In gifts it is essential that the donor be in actual or constructive possession of the property which is the subject of the gift and he must transfer that possession to the donee³. If possession is not given, its absence will not avail the plea of registered deed, for registration of a deed is not regarded as equivalent to delivery of possession for Mahomadans⁴. No formal act or physical change of possession need take place; all that the law requires is that the donor has done all he can to transfer the possession of the property to the donee. In Arif's case 34, I. A., 167, the Privy Council held "that the doctrine of Musha⁵ is inapplicable to the condition of progressive society and should be confined within the strictest rules." Transfer of Property Act does not make any change in the Law of Moosha, *i. e.*, an undivided share in property, whether movable or immovable⁶. *Hiba-bil-ewaz* is a sale in all respects and delivery of possession is not required to complete it⁷. It takes the nature of a gift in the beginning. After delivery the transaction has incidents of sale and cannot be revoked; *Hiba-bishart-ul-ewaz* is a gift in the commencement and continues to be so; after the condition is performed it becomes a sale⁸.

¹Hedaya, p. 482; Koran, Book 3; Principles of Mahomadan Law by F. B. Tyabji, pp. 261—263, 313—328.

²Amir Ali, *Mahomadan Law*, Vol. I., pp. 26—30.

³Macnaghten, *Mahomadan Law*, case XXII: Baillie, 514.

⁴I. L. R. 23, Bom. pp. 682,

⁵*Principles of Mahomadan Law*, by F. B. Tyabji, pp. 285-292.

⁶*Hedaya*, Vol. VIII, p. 488; I L.R. 16 I.A., 265.

⁷Baillie, pp. 532, 533. Jainabai v. R.D. Sethna (1910) 34 Bom. pp. 604, 609, 610, 613, 616, For Beaman J.

⁸Amir Ali, *Mahomadan Law*, Vol. II., 102; Baillie, p. 534, also F.B. Tyabji, *Principles of Mahomadan Law*, p. 315.

In Anglo-Indian Law if property is purchased in the name of a son, it does not raise the presumption of advancement as in English Law, nor does it raise a use as in English Law. The Court puts the plain question from whose pocket the purchase money was given and declares the resulting trust in favour of that person who paid the purchase money. In *Shankar v. Umabai* I. L. R. (1913) 37 Bom. 471, 479, a policy of insurance was effected by the assured upon his own life, expressed to be for the benefit of his wife. Scott C. J. held the policy was a contract between the deceased and the Insurance Company expressed to be for the benefit of the wife of the assured whereby the company promised on proof of the death of the assured to pay the policy monies to the trustee or trustees to the beneficiary (the widow of the assured) and if the beneficiary be dead, to the assured's heirs, executors, administrators or assigns. Unless and until the appointment of trustees on behalf of the wife, it was in the power of the assured to defeat the expectation of his wife by assigning the policy to a creditor. He could divest himself of his beneficial interest in the policy only by assignment in writing as provided by sec. 130 of the Transfer of Property Act (IV of 1882) or signed declaration of trust as provided by sec. 5 of Trust Act (II of 1882). He had adopted neither course. The policy on his death formed part of his estate, the right of action against the company being in his executors or other representatives untransacted by any trust in favour of his wife. There is nothing in the Contract Act (IX of 1872) to show an intention that a person not a party to the contract can sue on it. In the *Oriental Government Security Life Assurance, Ltd., v. Vanteddu* (1912), 35 Mad. 162, 166, it was decided that where the assured does not in his lifetime create any trust in respect of the money payable under a policy of Life Insurance for the benefit of his wife and children such money, in cases where the provisions of the Married Women's Property Act do not apply, forms part of his estate and is recoverable by his legal representatives.

While in *Pokkunuri Balamb av. Kakaparti* (1913) 25 Madras L. J. pp. 65, 73, 74, 78, 79 (F. B.) July 1913 (No. 3) it was decided that where a Hindu male effects a policy of insurance which expresses on the face of it to be for the benefit of his wife or his wife and children or any of them and dies leaving a daughter by virtue of sec. 6 of Act III of 1874 (Married Women's Property Act) a trust is created in favour of the daughter and the amount of the policy is not available for the creditors, *Oriental Government Security Life Assurance, Ltd., v. Venteddu Ammeraju* (1911) I. L. R. 35 Mad. 162 was not followed.

Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a Contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and where such interests were of unequal value proportionately to the value of their respective interests¹.

Recital in a conveyance deed is *prima facie* evidence of consideration paid. If an assignment is incomplete, the absence of consideration becomes of material difference. The Court will not assist an assignee because he is no better than a person from whom he took the property; a promise to give is made without any consideration². But if the assignment is perfectly carried out, the want of consideration is no answer on the debtor's part; and the right of the assignee is quite perfect. The assignee gets an irrevocable right to the property by proving consideration.

RULE II.—Conveyance though valid, as against the Transferor, may be set aside by other persons for want of valuable Consideration.

On this point Anglo-Indian Law is a close copy of English Statute law, but certain modifications are introduced to suit the circumstances of the people.

¹Transfer of Property Act,
sec. 46.

²*Ellison v. Ellison*, I W. &
T. 291.

(1) Every transfer of immovable property made with the intent to defraud prior or subsequent transferees thereof, for consideration or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

(2) Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

(3) Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration¹.

The first and third paragraphs of the section are based on Statutes 13 Eliz, c. 5 and 27 Eliz. c. 4. These two English statutes are repealed by this section. Hence the words of the section are to be followed in cases of conveyances, in fraud of creditors, or in fraud of purchasers for value.

The second part of the section is based on two cases, *e.g.* *Twyne's Case*² and *Ellison v. Ellison*³. The law presumes from the subsequent sale of the same property for value that the first voluntary transaction was made with intent to defraud. The principle is that by selling the same property for value, the seller entirely repudiates the former voluntary conveyance. This shows that he had a dishonest intention at the time and the second sale was made in order to defeat the purchaser, *Doedem Newman v. Rusham*⁴. Such a presumption will not arise if a man, having made a gift of lands for charity, afterwards conveys part of the same land to a third person for value⁵. It will

¹ Transfer of Property Act, sec. 53.

² 1 S. L. C. 1.

³ 1 W. and T. 291.

⁴ 17 Q.B. 723, 725.

⁵ *Ramsay v. Gilchrist* 1892 A. C. 412, 416.

able property made
or subsequent trans-
or co-owners or other
such property, or to
transferor, is voidable
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1 27 Eliz. c. 4. These
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Q.B. 723, 725.

may v. Gilchrist 1892
12, 416.

not apply if the prior transaction was one of mere gift ;
for the Courts in determining whether a transfer is
voluntary do not inquire into the amount of Considera-
tion. The Statute 13 Eliz. c. 5 is declaratory of the
Common Law and the present section declares the law
about creditors as it once existed in India before this
Act was passed in 1882. Manu writes: "The gift
by a man of his whole property is unlawful and in-
operative as against a creditor. When a judge
discovers a fraudulent pledge or sale or fraudulent
gift and acceptance, or in whatever other case
he detects a fraud, let him annul the whole trans-
action¹."

In Mahomedan Law if a person is insolvent and makes
a gift, it is void *ab initio* according to the Maliki School;
Hanifi lawyers hold that *kazi* may avoid the gift at the
instance of creditors, if it was the intention of the donor
to defraud them. The indebtedness must be very
great to raise the presumption of fraudulent intention.
Future creditors have no right to impeach voluntary
conveyances². A gift or *waqf* made during 'mortal
illness' is valid to the extent of one-third only. *Waqf*
made by a person in insolvent circumstances cannot
be impeached by creditors nor by a subsequent
purchaser. The following are differences:—

(1) In order to set aside a conveyance the English
Statute requires that the action must be brought on
behalf of all the creditors, while the Anglo-Indian Law
enacts that a fraudulent transfer is voidable at the op-
tion of any creditor³.

(2) The section does not refer to movable property,
while the English Statute applies to both movable and
immovable property.

¹Manu, ch. VIII, secs. 143-
145, 149, 150.

²Amir Ali, *Mahomedan
Law*, Vol. I pp. 16—18;
Macnaghten 217 Case 15:
Appendix No. 45. p. 441.

The Transfer of Property
Act., s. 53, does not apply to
Mahomedans.

³The Agra Bank, Ltd. v.
Abdul Rahiman I sac 1. L. R.
6 Bom., I. Per Westg.

A gift can be disputed by (a) a person with whom the donor has previously contracted about the same property (sec. 40); or (b) by the creditors of the donor (sec. 53). If at the time of the gift the donor has entered into an agreement to sell the property to a third person, that person has the same right to obtain specific performance against the donee as he has against the donor, and the donee cannot urge that he had no notice of the contract.

Creditors can impeach consideration in a conveyance. Section 53 enacts that every transfer of immovable property made with intent to defeat or delay creditors is voidable at the option of the person so defeated or delayed. 13 Elis. c. 5 recites that it was passed for avoiding and abolishing feigned, covinous and fraudulent feoffments, grants, etc., as well as of lands, or of goods and chattels, which feoffments were devised and contrived of malice and fraud, to the end and purpose to delay, hinder and defraud creditors of their just and lawful actions. It enacts that every feoffment made for any intent or purpose so declared shall be deemed and taken only against the person whose action shall be anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void. It also provides for the protection of purchasers for value in good faith.

The creditor has to prove two things: (1) that the consideration was absent or was grossly inadequate raising a presumption of transferor's intention to defraud; and (2) want of good faith on the part of the transferee. The circumstance that transferee has paid a price so disproportionate to the actual value of the property as to shock the conscience may raise a very strong inference of fraud being intended. But a man cannot be convicted of dishonest intention because he has made a good bargain. In *Twyne's case* the suspicious circumstances were (1) the very insignificant price; (2) possession of the property was never parted with; and (3) the transfer was colourably

made just before the attachment, to avoid it being taken by the creditors¹. If sale is intended, the amount of price is a matter for the parties to consider and gross inadequacy is no defence to specific performance of the contract if both parties were really ignorant of the proper value. But gross inadequacy of price may be evidence of fraud.

Before this Act was passed in 1882, the position of a purchaser when property was conveyed without giving any express covenant for title or other special contract was not quite clear. In English Law the purchaser of land who after the execution of the conveyance is evicted by a title to which the covenants do not apply, cannot, in the absence of fraud, recover the purchase money, because the purchaser has the means of ascertaining whether the title is good or he may protect himself by proper covenants. If he fails to do so, he has to suffer the consequences of his own negligence. The English rule is *caveat emptor*. In Anglo-Indian Law it was decided without reference to this Act that an action to recover purchase money as money paid for a Consideration that had entirely failed, might be maintained by the purchaser, because where a person sustains loss by reason of breach of contract, he is *prima facie* entitled, as far as money can do it, to be placed by awarding damages in such a situation as if the contract had been carried out². This rule does not apply in the English Law to contracts for the purchase of immovable property. *Bain v. Fothergill* decided that the purchaser of real estate cannot recover damages for the loss of his bargain, but only his deposit and the expenses he has incurred, and this is true even if the vendor knew that he had no title, nor any means of acquiring it. The purchaser may sue in an action for deceit, but not on the contract. This rule is supported on the ground that the purchaser of real estate in England must expect some uncertainty

¹I. S. L. C. 1.

²*Robinson v. Harman*. 1848, 1 Ex. 850, 855; Finch, Sel. Ca. 733.

in the title of the real estate of the vendor, but in the case of chattels the vendor must know, or is presumed to know, whether he is the owner of the chattels or not¹.

This rule does not apply :

(a) in cases where there is wilful default in giving possession².

(b) If there is an express covenant for quiet enjoyment in executed conveyance³.

(c) If there is an executory agreement to make a title by a person who on the face of the document cannot have any title at its date.

(d) If there is an unreasonable omission to complete the title by taking some definite step which the vendor has the power to do, *e.g.* by applying to the lessor for consent to assign.

(e) If there is loss caused by the vendor's own negligence in completing.

In Anglo-Indian Law *Bain v. Fothergill* was followed in *Pitamber v. Cassibai*⁴ In *Nagardas v. Ahmedkhan*; Farran C. J. said: "The legislature has not prescribed a different measure of damages in the case of contract-dealing with land from that laid down in the case of contracts relating to commodities." Hence if a purchaser of land claims damages for the loss of his bargain the question to be determined is whether the damages alleged to have resulted to him 'naturally arose in

¹*Bain v. Fother Gill* 1874, L.R. 7 H. L. 158, 173, 206.

²*Royal Bristol Permanent Building Society v. Bomash*, 1887, 35 ch. p. 390.

³*Lock v. Furze* 1866, L. R. 1 C, p. 441, 453.

⁴1886 11 Bom. 272, 282. *Ranchhod B h a w a n v. Manmohandas Ramji* (1907) 9 Bom. L.R. 1089, 1092 Macleod J. said: In India in case

of breach of contract for sale of immoveable property through inability on vendor's part to make good title, the damages must be assessed in the usual way unless the parties expressly or implied by Contract that such inability shall not make the vendor liable for damages "

⁵1895, Bom. 21 175, 182.

the usual course of things from such breach.' The English rule is very anomalous and can be defended on the peculiarity of English titles. It is not expedient to apply the English rule to similar cases in India according to the principle of justice, equity and good conscience. If the vendor of land gives guarantee of his title to the land, and the purchaser is evicted, the value of the land at the time of his eviction will measure the damages.

In Anglo-Indian Law the buyer may bring an action on implied covenant for title. Section 108-A (a) enacts that the lessor is bound to disclose to the lessee any material defect in the property with reference to its intended use, of which the lessor is, and the lessee is not, aware and which the lessee could not with ordinary care discover. There is no provision for defect of title in leases, and no provision for covenant for title by the lessor. Omission to disclose defects is not fraudulent, but in the case of sale it is (sec. 55).

There is no provision made in Anglo-Indian Law similar to the Bills of Sale Act. In pledge of movables, possessions must be given to the creditor. Statute 11 and 12 Vict. c. 21, section 42 is repealed. Neither Indian Contract Act nor Indian Transfer of Property Act contains any provision for the mortgage of moveables as distinguished from pledge¹ in which possession of the subject matter of security is transferred to complete the transaction. But in this country from very early times mortgages of moveables have been made and recognised even though delivery of possession is not given². Dr. Rash Behari Ghose writes; Contract Act is silent on the subject of hypothecation of moveables. We must not infer from the silence of

¹ The Indian Contract Act IX of 1872, s. 172.

² Gour's Transfer of Property Act. 2 Vol., p. 721, sec. 1 110,

ed. 3rd; Sib Chunder Ghose v. Chunder Russick Neoghy (1842) Fult I Vol, pp. 36, 42, 43: Per Grant J.

the Legislature that such transactions are invalid in his country or that they may not to be enforced event against *bona fide* purchasers without notice¹.

C.--OBLIGATION TO DISCLOSE CONSIDERATION.

In Anglo-Indian Law certain contracts must be reduced to writing.

(1) If an agreement is made without valuable consideration it must be expressed in writing and registered, and must be made on account of natural love and affection between parties standing in a near relation to each other².

(2) If a promise be made in writing and signed by the person to be charged therewith, or by the agent of that person, to pay wholly or in part a debt which could have been recovered by the creditor but for the Act of Limitation³ no consideration is required.

(3) Agreement to refer any existing dispute between the parties to arbitration must be in writing⁴.

(4) A memorandum of association, articles of association and contracts by companies are required to be reduced to writing⁵.

(5) The Transfer of Property Act, 1882, requires writing in the case of a sale (sec. 54), mortgage (sec. 59), lease (sec. 107), gift (sec. 123).

(6) The Indian Trusts Act requires a trust to be created in writing (sec. 5).

¹Ghose on Mortgages pp. 108-109. (Tagore Lectures) 4th ed.

Shivram v. Dhau (1901) 4 Bom. L. R. 577-581.

Damodar v. Atmaram (1906) 8 Bom L. R. 344.

In matter of A. Summers (1896) 23 Cal. 592, 601.

Hamiltons Hedaya IV Vol. 189.

Wilson's Digest of Maho-

madan Law (2nd ed.) pages 343, 363.

Amir Ali's Mahomedan Law I Vol. p. 61.

²Indian Contract Act. s. 25 (1).

³XV of 1877; Contract Act, s. 25 (2).

⁴Contract Act. s. 28.

⁵Indian Companies Act, VI of 1882, sects. 11, 39, 67.

(7) The Merchant Shipping Act V of 1859; V of 1883, is based on English Shipping Act. In Anglo-Indian Law certain Acts of Imperial Parliament are repealed, *e.g.*, Statute of Frauds, but there are Acts dealing with the subject.

The Statute of Frauds 29 Charles II, ch. III, requires certain contracts and agreements to be reduced to writing and such contracts will not be enforced otherwise. The Indian Registration Act makes registration of certain documents compulsory.

Sections 1, 2, 3, 4, 7, 8, 9, 11, 17 of Statute of Frauds are repealed by Trusts Act No. 2 of 1882. Section 7 of Statute¹ of Frauds was mainly intended to regulate procedure. It never applied to India at any time. Even if it did, the Indian Evidence Act I of 1872 entirely superceded it.

13 Eliz., c. 5 and 27 Eliz., c. 4, dealing with Fraudulent Conveyance, are wholly repealed by Transfer of Property Act No. 4 of 1882.

¹Sir Dinsha M. Petit v. Sir (1909), 33 Bom., pp. 541, 546.
Jamsetji Jijibhai, I. L. R.

CHAPTER V.

THE DOCTRINE OF CONSIDERATION IN ENGLISH COLONIES.*

There is not one system of law obtaining alike in all British Colonies. The principles of the administration of the colonies are based on equity and good conscience. Those principles were meant to respect the people to whom they were to be applied. Some colonies were occupied, others were conquered or ceded to the British Government.

When a new and uninhabited country is discovered by English subjects, the general rule is that it is their birth-right to carry their own laws with them wherever they go. Newly-found countries are governed by the laws of England. This rule applies to barbarous countries also. (*Mayor of Lyons v. East India Company*¹). According to this rule newly-found countries are governed according to English Law, and the Doctrine of Consideration prevails in those colonies as it does in England ; subject to such modifications as are required to suit the circumstances.

In conquered countries the rule is that the laws prevailing there at the time of the conquest continue to prevail until they are altered by the conqueror ; *e.g.*, in Lower Canada (Quebec) the old French Law

N.B.—

*This Chapter is based on the replies to questions which were sent by the Colonial Office to various Colonial Governments in 1895. The replies are published in the *Journal of Society of Comparative Legislation*.

Vol. I, pp. 134—190, 358—385.

Vol. II, pp. 258—298.

New Series Vol. I, pp. 70—74, 296—301.

Vol II, pp. 86—117, 284—288.

Also an article on The Sources of the Law in the Colonies, by Prof. Harrison Moore.

Journal New Series. Vol. II, p. 276.

¹Moore's P. C. C. 273.

prevails unless altered by legislation in civil matters. In St. Lucia a Code of Civil Law based on the principles of the ancient law of the island came into force in October 1879. In Mauritius French Codes prevail for civil matters. In Ceylon, the Cape of Good Hope, Natal and in the Civil Courts of British Guiana, the Roman-Dutch Law prevails.

In Trinidad the laws of Spain, as established there when England captured it in 1797, still prevail in so far as they are not abolished by legislation. Spanish Law governs such matters as the construction of deeds, the disposition of property made by will, the institution of heir and succession to the persons born before 1846. By Ordinances fragments of the English Common Law, as amended by statute relating to civil rights, were introduced. In Gibraltar the law of England, as it existed on 31st December 1883, subject to some exceptions, is still in force¹.

In ceded territories the sovereign's legislative power is the same as in conquered colonies except that if the treaty of cession regulates the right of legislation, the terms of the treaty must be obeyed, *e.g.*, Mauritius was ceded to Great Britain in 1810 by France, on condition that the inhabitants should preserve their religion, laws and customs. Hence French Law, as established in that colony before 1810, must be respected.

The difference between colonies by settlement and colonies by conquest or cession is mainly this. In the one case there was no civil institution at the time of settlement and hence English Common Law applies. In the other case there was a civil institution at the time of conquest or cession.

Where parties to a contract reside in different countries having different systems of law, their intention is the true guide to find out by what system of law that contract must be interpreted and governed. The

¹Order in Council, Feb. 2, 1884, p. 579.
1884; cl. 2, *London Gazette*,

law of a colony upon any particular point must be proved like any other fact: (1) By expert evidence; (2) 22 and 23 Vict., c. 63 enacts that Court of one part of Her Majesty's Dominions may remit a case for opinion in law of a Court in any other part thereof; (3) 24 Vict., c. 11 enacts that Superior Courts within Her Majesty's Dominions may in any action remit a case to the Court of any foreign state with which Her Majesty may have convention, to ascertain the law of the state.

The Crown has the prerogative of establishing courts to proceed according to Common Law. But a new court cannot administer a new law without Act of Parliament¹. The prerogative gives the government of a colony priority in bankruptcy in simple contract debt².

The basis of the law of most of the colonies, including the colonies formed by settlement and occupation, says Bryce, is the law of England, *viz.*, the Common Law, Equity and Statute Law up to the date of the settlement. Here is unity. It is not co-extensive with the Empire: Scotland, Quebec, and the whole of South Africa stand outside it, while all the United States except Louisiana come within it³.

By Acts of Colonial Legislature, 1841, it is declared that the Common Law of England applies, subject to such variation as the circumstances and peculiarities of the place may require⁴.

There is hardly any colony in which the Law of Contract is codified. It is expressly stated that the law which was in force in England before a certain date (this date varies in the colonies) shall apply. The Common Law of England applies in the colonies hereafter named. It also follows that the Doctrine of Consideration prevails in them.

¹3 Moore's P.C.C. N.S. 152.

²Terring on *The Colonies*, p. 18; *Legislation of the British Empire*, in 4 vols.

³Bryce *Studies*, Lecture 2, p. 389.

⁴Ilbert's *Legislative Methods and Forms*, pp. 167, 168, 202—207.

Antigua.—Antigua is an island in the British West Indies and is one of the five Presidencies of the Leeward Islands. The laws of Antigua consist of the Acts of the Leeward Islands in force in Antigua and the Acts of Antigua from 20 Car. II 1668 to 28 Vict. 1864.

1. The Common Law of England is in force as far as unaltered by the written law of the colony or Acts of Parliament extending thereto¹.

2. There is the law relating to bills of exchange (No. 33, section 31); No. 157, sections 15, 40 deal with consideration in bills of exchange. The law is based on English Bills of Exchange Act, 1882. There is the peculiar Act, No. 33 (Protected Bills of Exchange Act), section 31, which enacts that acceptance of bill inland or foreign must be by writing and signed.

3. Act for the relief of creditors against fraudulent devises. It declares devises void against creditors. All wills and testaments, limitations, dispositions, shall be deemed and taken to be fraudulent, absolutely and utterly void, frustrate and of no effect; any pretence, color, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding, provided always and be it enacted by the authority aforesaid that where there hath been or shall be any limitation or appointment, devise or disposition of or concerning manors, etc., for raising or paying of any real and just debt or any portion, sum of money for any child or children of any person other than the heir-at-law, according to or in pursuance of any marriage contract or agreement in writing *bona fide* made before such marriage, the same and every of them shall be in force.

4. An Act (157 sec. 37) enacts that consideration for guarantee need not appear in writing (19 and 20 Vict. c. 97, sec. 3).

5. Conveyances void as to creditors unless made for valuable consideration [31 Geo. IV (1791) No. 33, sec. 100]. The Act enacts that all deeds, conveyances

¹ 31 Leeward Islands, s. 2.

assurances in writing or otherwise of lands, tenements, goods and chattels, whatsoever, are declared to be null and void as to creditors unless the party or parties to whom the same is made make it appear by legal proof that he is actually and *bona fide* purchaser for valuable consideration really paid or secured without any coin, or for other valuable consideration in law according to the laws and statutes provided and made before the settlement of this Island in such cases.

6. There is an Act corresponding to the Statute of Frauds.

7. Merchant Shipping Act 17 and 18 Vict., c. 108, amended by 18 and 19 Vict. c. 91; 25 and 26 Vict. c. 63 is made applicable to this colony.

The
Bahamas.

The Bahamas.—Historical documents relating to the Bahama Islands are compiled by Harcourt Malcolm¹.

1. The Common Law and certain parts of the Statute Law of England are extended to the Bahama Islands. 40 Geo. III c. 2 declares how much of the laws of England is applicable within this Island (1799 A.D.). The general rule is that the Common Law of England, in all cases where the same hath not been altered by any Acts or Statutes hereafter enumerated, is of right and ought to be in force.

The Doctrine of Consideration is in full force in this Colony.

2. A list of Imperial Statutes in force here contains the following statutes among others as binding: 13 Eliz. Ch. 5; 27 Eliz. Ch. 4; so the law as to fraudulent conveyances is exactly the same as in England.

The Bankruptcy Acts and Statute of Frauds apply to this place. Verbal promises are not sufficient evidence of the continuance of any contract unless it be in writing. (10 Geo. IV c. 8.)

¹See Stark's *History and Guide to the Bahama Islands*, Boston, Mass, 1891; *The Bahama Islands* (Geographical Society of Baltimore, ed.

by G. B. Shalluck, New York, 1905). *Laws of the Bahamas, 1795 to 1899*, by Sir O. D. Malcolm, 1901, with index.

Composition with creditors is also regulated by Statute 33 Vict. c. 13.

3. Sale of Goods Act, 4 Ed. VII c. 37 (1904), is based on English Sale of Goods Act, 1892.

Conveyancing Act, 9 Ed. VII (1909), also is based on English Conveyancing Act.

Bills of Exchange Act is contained in 2 Vict., c. 4; 22 Vict. c. 17; 44 Vict. c. 7; 55 Vict. c. 5.

Voluntary settlement can be avoided. Any settlement of property made by a *trader* not being a settlement made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for value or a settlement made on or for the wife, or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement be void, etc. This is copied from the English Act of Bankruptcy, section 47.

Barbados.—Consolidation took place in 1893.

Barbados.¹

The Common Law is the basis of Statute Law here. The colony of Barbados was founded by British settlers in 1624. Charles I. gave a charter and confirmed it in 1652. In 1666 an Act was passed for better ascertaining the laws of this place.

The law consists of the Common Law of England, Imperial Statutes before 1652, and local Acts. The Common Law of England is the Common Law of this colony in all matters affecting the rights relating to contracts and property, whether in equity or at law. The law is substantially the same as it is in England in Courts of Equity and Common Law. The Doctrine of Consideration is in full force.

1. The Statute of Frauds was copied from English Statute by the legislature in 1762.

¹The Laws of Barbados are contained in six volumes, 1667—1893. Ligeon's *History of the Barbados*, 1657. The

British Empire in America, 1741, by Oldmixon. *The Quarterly Journal of the Geographical Society*, London.

The Merchant Shipping Act applies to this colony.

The Chancery Procedure is precisely what it is in England and Common Law Procedure is based on Common Law Procedure Act.

2. Voluntary settlements will be set aside by creditors. The law is substantially based on 13 Eliz. c. 5, and 27 Eliz., c. 4.

3. Act of Bankruptcy (1892) No. 3.

4. Bill of Exchange, No. 7 of 1893, sec. 30, deals with presumption of value and good faith.

5 Bill of Sale No. 1 of 1893

6. Bond given for gambling is void. (Act 5 of 1891, sec. 12.) All notes or securities given for money or other valuable thing won by gaming or for repaying any money lent for gaming shall be void. Conveyance will be void when consideration is money won by gaming.

Any person losing and paying five pounds by playing and betting may within three months sue for and recover the same with costs by action of debt.

If the person losing such sum will not sue for the same any other person may recover the same and treble the value thereof with costs, section 13.

7. Promise to pay debt of another must be in writing by Act of 1762.

8. Merchant Shipping Act, 1891 (45), requires certain agreements to be reduced to writing.

9. Pawnbrokers Act 1885—(4).

Bermuda.

Bermuda.—The law of Bermuda was consolidated and codified from 1690 to 1902 by Reginald Grey.

The Common Law of England is the Common Law of this colony. The Statute Law consists of English statutes applicable to circumstances of the colony, and Acts of the legislature since 1690. The law in force is of English origin.

Conveyances will not be avoided if they are *bona fide* made, even though they may be voluntary; under

27 Eliz. c. 4 if registered within six months. (Act No. 2 of 1896.)

Fraudulent conveyances of real estate are void. (Creditors' Act No. 2 of 1787; and Court of Bankruptcy Act 1876.)

Conveyancing Act 1845, section 2, enacts that property Deed. may be conveyed by a deed without delivery of possession.

Persons not party to a deed may take benefit under it as under deed Poll, Conveyancing Act 1845, section 9. The word grant in a deed does not create warranty or implied covenant.

The Merchant Shipping Act is copied from English Statute.

There is also the Trustee Act of 1876.

British Honduras.—This place was acquired partly British Honduras. by cession in 1670 and partly by settlement. The Common Law of England and all statutes of Imperial Parliament in abrogation or derogation or in any way declaratory of Common Law of England are in force in this colony so far as the local jurisdiction of the Court and local circumstances reasonably permit¹.

Section 6 enacts that Imperial Statutes relating to Bankruptcy are excluded from operating in the colony; also those regulating any trade, profession or business. The Consolidated² Laws came into force on 15th December 1888. By virtue of Ordinance (VII of 1888) before this date the Common Law of England had been adopted. The Consolidation Law supersedes all previous Colonial Statute Law. A list of Imperial Statutes made applicable to this colony is appended to the volume quoted.

The Bills of Sale Act 1878, and the Judicature Act 1873, are made applicable. The law is of English origin.

¹The *Consolidated Law of*
1888. *Proceedings of the*
Royal Geographical Society,

Volume XI, London, 1889.

²See *Consolidated Laws of*
1888, ch. 7, s. 3.

A contract for the sale of goods for £10 or more is required to be in writing.

Gambling securities are void.

Promises or agreements by parol must be reduced to writing and signed.

Bona fide purchaser of goods fraudulently removed is protected. (Part X, Ch. XXII, sec. 21.)

Part IV, ch. 7, deals with the application of English Law. Law and equity must be administered concurrently.

Whenever it is declared that the Common Law of England or any Imperial Law shall extend to the colony, the same shall be deemed to extend thereto, so far as the jurisdiction of the Court and local circumstances reasonably permit. The statutes of Elizabeth on frauds of creditors and purchasers are in force.

Ordinance of 1901 on Bankruptcy.

Fraudulent settlements can be set aside :—

- (1) In the case of a settlement made before or in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement.
- (2) In the case of any covenant or contract made in consideration of marriage for future settlement, on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife). If the settlor is adjudged bankrupt, compounds or arranges with his creditors and it appears to the Court that settlement, covenant or contract was made to defeat or delay creditors or was unjustifiable having regard to the state of the settlor's affairs at the time it was made, the Court may refuse or suspend an order of discharge or grant an order conditionally.

British Columbia—By Ordinance No. 7 of 1867 to British establish the general application of English Law¹ Columbia. the Civil and Criminal Laws were made applicable as they existed up to November 19 of 1858 and so far as the same are not from local circumstances inapplicable. The doctrine of Consideration is fully applied here. Revised Statutes of British Columbia were published in 1897.

British Islands in the Western Pacific—There is a British difference in the law about voluntary conveyances. Islands in the Western Pacific. They are valid if registered (Land Registry Ordinance of 1897, Ch. III, sec. 44). No conveyance, grant, lease, or charge which is executed in good faith and, duly registered in proper Land Registry Office shall be, by reason of the absence of valuable Consideration, void, frustrate and of no effect as against such purchaser or his heirs. (Fraudulent Conveyances Act, Ch. 86.)

There is no collective edition of regulations published. The Common Law of England under the authority of the Pacific Order in Council, 1877, applies to all non-native subjects in the British Solomon Islands and Gilbert and Ulice Islands Protectorate.

The law consists of native law framed by council and under the provisions of the Pacific Orders in Council (1877, sec. 22 and 1893, sec. 20), the law in force in England is in force. So the doctrine of Consideration prevails, subject to native laws. There is no other statute of any other colony in force.

The Falkland Islands—6 Vict. No. 13 empowered The the settlers to make and delegate powers vested in Her Falkland Majesty. Islands.

Ordinance 10 of 1853 constituted a Court of magistrates and conferred upon it powers and jurisdiction exercised by the Court of Queen's Bench, Common Pleas, Exchequer, Quarter Sessions, Oyer and Terminer. On 25th February, 1892, Letters Patent were

¹*Statutes of British Columbia, 1901.*

issued declaring these settlements to be colonies of Great Britain. The Statutes of the United Kingdom apply by virtue of Ordinance of 1898.

The Gold Coast.

The Gold Coast—Ordinances for the Gold Coast were published in 1895 by order of the Government.

The Common Law of England, as it existed on 24th July 1874, was made applicable in this colony.

Ordinance No. 4 of 1876, sec. 19, enacts that native law and custom not repugnant to natural justice shall apply between natives specially in matters of marriage, tenure of real and personal property and inheritance. It follows that the Doctrine of Consideration obtains in the colony. The Statute Law consists of Ordinances. There are no statutes of Imperial Parliament applicable to this place.

Ordinance 10 of 1894 enacts Bills of Exchange. consideration for a bill may be constituted : (a) by any consideration which will support a simple contract. (b) By an antecedent debt or liability ; such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future date.

The rules of Common Law including Law Merchant, save in so far as they are inconsistent with express provisions of this Ordinance, shall continue to apply to Bills of Exchange and Cheques¹.

Gambia.

Gambia—The Common Law of Gambia is the Common Law of England. As early as 1618 English merchants settled there and Common Law was in use.

In 1888 Gambia became a separate colony².

The Bills of Exchange Act of 1882 applies to the colony. The doctrine of Consideration is in force. In protected territories where the majority of the

¹Sarah Fanti, *Law Report of Decided Cases on Fanti Customary Law*, 2nd edition, 1904.

²Gambia Protectorate Ordinance, 1894, secs. 26, 27. Imperial Consolidation Act of 1861.

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* Gambia Protectorate Ord-
nance, 1894, secs. 26, 27.
Imperial Consolidation Act of
61.

population is Mahomadan the customs are based on the
precepts of the Koran.

Gibraltar—The Common Law of Gibraltar is the Gibraltar.
English Common Law. In *Jephson v. Riera* (3 Knapp's
P. C. Reports 150) discussion about the law prevailing in
this place is given.

The Statute Law consists of Imperial Statutes, Orders
in Council and Local Ordinances. Various charters
were granted¹. The law is of English origin.

The Law of England as it existed on 22nd August
1867, was declared in force in Gibraltar.

The English Law of Contracts is in force; *e.g.*, Bills of
Exchange No. 9 of 1907; and Bankruptcy Order in
Council, 20th November 1894.

Grenada—The Common Law of England is in force Grenada.
Hence the English Doctrine of Consideration is appli-
cable to the place².

Labuan—The Common Law of England prevails. Labuan.
The island was ceded by the Sultan of Bruner in 1846
and became a crown colony. Indian Codes are adopted
partly. There is no code or enacted law of non-British
origin. The Doctrine of Consideration prevails

Hong Kong—The Island of Hong Kong was ceded Hong
to England by the Chinese in 1841. Kong³.

The law in force consists of the Common Law of
England as it existed on 5th April 1843, except so far
as that law is inapplicable to the local circumstances of
the colony or of its inhabitants. Supreme Court
Ordinance 1893, sec. 5 and Statute Law.

1. The doctrine of Consideration applies in Hong
Kong, Pawnbrokers Ordinance No. 1 of 1860.

¹ *Gibraltar Laws*, 1890, p.
503.

² *Laws of Grenada*, 1875.

³ *Ordinances of Hong Kong*,
3 vols. 1904.

Ordinance No. 1 of 1864, section 2, was passed to amend the Law of Trade and Commerce and it is declared that Consideration for gurantee need not appear by writing.

Ordinance No. 3 of 1885 consolidates law relating to Bills of Exchange and sections 27—30 deal with consideration in a negotiable instrument. This is copied from English Law of Bills and Notes.

2. Bills of Sale, Ordinance No. 7 of 1886, is based on English Law.

3. For matters relating to gambling, see Ordinance No. 2 of 1891.

4. Bankruptcy¹ is dealt with by Ordinance No. 7 of 1892.

Voluntary settlements will be avoided if any property not being settlement, made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration or made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy and shall, if the settlor become bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the party claiming under the settlement can prove that he was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement and that he interest of the settlor of such property had passed to the trustee of the settlement on the excution thereof.

Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not, at the date of his marriage, any estate or interest,

¹Cf. 46 and 47, Vict. cl. 52, sec. 47. English Bankruptcy Act.

whether vested or contingent, in possession or remainder, not being money or property of or in right of his wife shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the covenant or contract, be void against the trustee in bankruptcy.

Settlement shall, for the purposes of this section, include any conveyance or transfer of property¹.

Lagos—The Common Law of England applies here. It was introduced in 1876 when Lagos and the Gold Coast were erected into a colony called the Gold Coast Colony. In 1886 Lagos was separated from the Gold Coast Colony and the law in force on the Gold Coast was to apply in the Colony of Lagos. Ordinance 1876, sec. 19, enacts that native laws and customs “not being repugnant to natural justice, equity and good conscience, not incompatible either directly or by necessary implication with any enactment of the Colonial Legislature,” are to apply “in causes and matters where the parties are natives of the colony” and “also in causes and matters between natives and Europeans where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law.” The statutory law consists of law passed by legislation and the statutes of general application in force in England.

Leeward Islands—Common Law is the basis of Leeward Statute Law. All the islands were acquired by settlement except Doninica⁴.

The existing laws of England were applied to Dominical by Royal Proclamation of 7th October 1763.

The Common Law of England prevails by settlement and adoption. Imperial Acts apply to the colony. Acts and Ordinances of the Federated Colony from 1798 and by subsequent Acts and Ordinances of the presidencies

¹Sale of Goods Act, Ordinance No. 4 of 1896. Merchant Shipping Ordinance, No. 10 of 1899

²*Collection of Laws of Lagos,*

by George Stallard and Richards.

³Acts of Leeward Islands from 1872 to 1885.

⁴Acts of Dominica, 1858.

thereof, both before and after the Second Federation of 1871, under the Imperial Leeward Islands Act of 1871 (34 and 35 Vict. No. 107), so far as applicable to the conditions of the colony by settlement in the seventeenth century and by adoption¹. There is no code or body of law of non-British origin². The Doctrine of Consideration prevails.

Jamaica.

Jamaica—The Common Law of England was introduced in 1655. It has been held that Jamaica is a settled and not a conquered country. In 1655, the original colonists brought with them the Statute Law of England which was made applicable to them according to circumstances of the place. In *Jaquet v. Edwards*, decided in 1866, it was held by the Supreme Court “that Geo. II c. 1, sec. 22, which enacts that all such laws and statutes of England as have been at any time esteemed, introduced, accepted and received as laws in this island shall and are hereby declared to be laws of this island for ever.” There is no code or law of non-British origin.

In 1889 a collection of laws applicable to Jamaica was published by government authority. There are selected statutes also³.

Bills of Sale No. 27 of 1867 based on English Bill of Sale Act.

Bankruptcy Law is No. 33 of 1879.

Voluntary settlement will be set aside by creditors for they are not *bona fide* and for value.

Newfoundland.⁴

Newfoundland—The Common Law of the colony is the Common Law of England, introduced by colonisation and settlement of the colony. The doctrine of Consideration is in force.

¹Terring, *Colonial Law*, p. 8.

²Anson, *Law of Constitution and Custom*, Vol. III, pp. 60—68.

³*Digest of Laws of Jamaica*, by J. Minot.

⁴Chitty's *Statutes* are of practical utility.

The Statutory or Enacted Law of the colony consists of the Acts of the Colonial Legislature which met in 1833 for the first time. The local legislature has copied Imperial legislation as far as possible. There is no law which is not of British origin. The consolidation of the laws of this colony was carried out in 1892.

Sierra Leone—The Common Law of England pre-Sierra Leone¹. In 1799, a charter was granted to a company known as the Sierra Leone Company². The Statutory Law of the colony consists of Ordinances based on the law of England.

Straits Settlement—The Common Law of England as it stood in 1826 is the Common Law of this place. It was so decided in *Choa Choon Neo v. Spottiswood*, approved in *Ong Chong Neo v. Yeap Cheap Neo*³. There are particular laws applicable to Hindus, Christians, Parsis. The Statute Law consists of the Acts of the Governor. English laws are followed. There are Acts relating to Conveyancing and the Law of Property Act of 1886, Bills of Sale Ordinance 1886, Bankruptcy Ordinance, 1888, Mercantile law is English law.

The collective edition of Ordinances was published in 1867.

Penang—The law of England must, having regard to the Royal Charters of 1807, 1826, 1855, be taken to be the law of *Penang* so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. Hence English statutes, which are quite inapplicable in their nature, do not prevail in Penang and are not introduced along with the general law of England. The law now in force in the Straits Settlement consists of (1) the Common Law of England as it was in 1826 and (2) special statutes applicable to particular races and creeds. Bill of Sale

¹ *Sierra Leone*, ed. of 1893, pp. 492—495.
by F. E. Pinkett.

³ *Per* Sir Montague Smith

² Clark, *Colonial Law*, L. R., 6 P. C. 381—393.

was passed by Ordinance XII of 1886. Section 6 enacts that a bill will be void under certain circumstances unless it be attested and registered. Bill of Sale given by way of security shall be void if amount secured be less than one hundred dollars.

Mercantile Law is to be observed in all commercial matters by Ordinance 8 of 1880, section 24.

By Gaming Ordinance V of 1888, the sale of lottery tickets is void. Section 9 of that Ordinance enacts that any money or money's worth paid or deposited for or in respect of any event or contingency or in respect of the purchase of a lottery ticket shall be recoverable as money had and received to or for the use of the person from whom the same was received.

Certain contracts are to be reduced to writing.

The Pawnbrokers Ordinance of 1872 was amended by Ordinance 11 of 1889.

Settlement avoidance is dealt with by Bankruptcy Ordinance 11 of 1885, sections 43—47. This is based on Statutes of Queen Elizabeth and the Bankruptcy Act of England.

The law of England prevails in all commercial matters by Ordinance No IV of 1878 and Civil Ordinance VIII of 1909. Thus the Doctrine of Consideration is in full force.

Malacca.

Malacca—This place was taken by the Dutch from Portugal in 1641. It was ceded to Great Britain in 1824. The English system of law prevails but customary land tenure is retained. That tenure of land is Mahomedan land tenure as received by the Malays, introduced by Arab influence as part of Arab civilisation. The land is held from the Crown under the Conveyancing and Law of Property Ordinance of 1886 and the Malacca Customary Lands Transfer Ordinance, 1901.

Australian Colonies.

Australian Colonies—All the Australian Colonies belong to the class of colonies acquired by settlement or occupancy. New South Wales was acquired by

settlement¹. The common source of law in the Australian Colonies consists of law of England at the date of settlement. It has been the accepted view that, if an uninhabited country be discovered and planted by English subjects, all the English Laws then in existence are immediately binding on the English subjects². But this, writes Blackstone³, means that colonists carry with them only so much of the law of England as is applicable to their own situation and the condition of an infant colony. The law of England includes :

- (1) Statute Law and Common Law.
- (2) Acts of Parliament which are made applicable to the colony. Lewis⁴ writes : " Only those Acts by which Parliament intends to bind the colony, whether those Acts were passed before or after the settlement of the colony will be in force.
- (3) Crown orders or regulation.

The Doctrine of Consideration, therefore, is fully applied in Australian.

The Commonwealth of Australia was formed 1st January 1901, under the Commonwealth of Australia Constitution Act, New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia were the first six states which formed the Commonwealth. By Act No. 9 of 1905, British New Guinea (Papua) was included in the Commonwealth.

All laws in force in England on July 25th 1828, not inconsistent with any Charters, Letters Patent, or Order in Council were made applicable to the colony. The Bill of Exchange Act, No 27 of 1909, section 32, deals with consideration in a bill. It follows the

¹ Cooper v. Stewart, 1889,
14 App. cases. p. 286.

² Salkeld 411.

³ 1 Com. 107.

⁴ Government of Dependencies, p. 201.

English Bill of Exchange Act, 1882. It enacts consideration for a bill to consist in valuable consideration.

- (1) It is constituted by (a) any consideration sufficient to support a simple contract, or (b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time.
- (2) Where value has been, at any time, given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time.
- (3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

Section 33. (1) An accommodation party to a bill is a person who has signed a bill as drawer or endorser without receiving value therefor and for the purpose of lending his name to some other person.

(2). An accommodation party is liable on the bill to a holder for value ; and it is immaterial whether when such holder took the bill, he knew such party to be an accommodation party or not.

Section 34. A holder in due course is a holder who has taken a bill complete and regular on the face of it.

Section 35. Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

The Marine Insurance Act, 1909, section 10, deals with avoidance of wagering or gaming contracts, *cf.* English Statute 6, Ed. VII, c. 41, section 4. Every contract of Marine Insurance by way of gaming or wagering is void.

New South Wales—The Common Law of New New South Wales is the Common Law of England².^{Wales¹.} The Statute Law consists of: (1) English Statutes existing at the time of occupation, (2) laws and statutes in force within the realm of England in 9 Geo. IV, c. 93, and (3) other Imperial enactments made applicable thereafter. All laws in force in England on July 25, 1828, not inconsistent with Charter, Letters Patent or Order in Council apply to this colony. It was so decided in *Quan. Yick v. Hinds*³ (1905). There are Imperial statutes made applicable to the colony and Acts of local legislature. The Doctrine of Consideration obtains in full force in this colony.

Games and wagers: all contracts or agreements whether by parol or in writing by way of gaming or wagering shall be null and void and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport or exercise. (14 Vict. No. 9.)

Insolvency 5 Vict. No. 17, section 6, enacts that every alienation, transfer, gift, surrender, or delivery, mortgage or pledge of any estate, goods or effects, real or personal, by any person who at the time is actually insolvent or who by such alienation, transfer or gift shall be rendered insolvent, to any person whatsoever without valuable consideration shall be and is hereby declared to be fraudulent and absolutely void.

¹Oliver's *Statutes*, 1879.

Cases, 286.

²Cooper v. Stuart, 14 Ap.

³2 Australia C.L.R., 345.

Section 7 enacts that all alienations, transfers, gifts, surrenders or deliveries of any goods or effects, real or personal, made by any person after he has contracted any debt and within twelve months preceding the commission of any act of insolvency by him or preceding the sequestration of his estate as insolvent or preceding any time at which it shall be made to appear by proof that he was actually insolvent, to any person whatsoever without valuable consideration shall be and are hereby declared to be liable to be set aside on a summary application to and by order of the Supreme Court at the instance of any creditor of the said insolvent whose debt was contracted or the cause of whose debt had arisen prior to the making of such alienations, transfers, gifts, surrenders or deliveries in so far as such creditor would thereby be prevented from receiving the full amount of his said debt. If any third party has purchased and acquired goods or effects for a just price or in satisfaction of a debt, the alienation cannot be set aside.

The following Acts governing this are based on English Statutes: Pawnbrokers Act, 13 Vict. No. 37; Bills of Sale Act, 19 Vict. No. 2; Bills of Exchange Act, 20 Vict. No. 30.

New
Zealand.

New Zealand—The Acts of the Imperial Parliament passed before January 14th, 1840, are declared applicable to this colony (21 and 22 Vict. No. 2). Act No. 8, 1845, Act No. 1, 1854, Act No. 19, 1860, have also been adopted in this colony. The Bankruptcy Act No. 12, 1908, is based on the English Bankruptcy Act; sections 75, 76, 77, 78, deal with the effect of bankruptcy on antecedent transactions. The Bill of Exchange Act No. 15, 1908, sections 27—30, deals with consideration. It is also based on the English Bill of Exchange Act; the Chattel Transfer Act No. 21, 1908; the Money Lenders Act, 1908.

The Mercantile Law Act, 1908, is a copy of English Mercantile Law¹.

¹Pawnbrokers Act, No 141, Act, No. 178, 1908.
1908; Shipping and Seamen

The Bankruptcy Act, No. 12, 1908, section 75, declares when settlement will be void in the event of bankruptcy.

With the exception of section 92 of the Judicature Act of New Zealand, the whole law of contracts (by deed or otherwise) in England applies to contracts in this dominion. The Doctrine of Consideration is the same as in England. The Statutes of 13 Eliz., c. 4; 27 Eliz., c. 5, apply to New Zealand.

The deed does not require sealing but must be signed by the party and attested by a witness who must also add his occupation and address. Defective voluntary trusts will be set aside as in English Law and rules of equity apply.

“ 75. Any settlement of property, not being a settle-
ment made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settle-
ment made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife,—

Effect of
Bankruptcy
on antece-
dent trans-
actions¹.

- (a) shall, if the settlor is adjudicated a bankrupt under this Act within one year after the date of such settlement, be void as against the Assignee; and
- (b) shall if the settlor becomes bankrupt at any subsequent time within three years after the date of the settlement, be void as against the Assignee, unless the parties claiming under such settlement prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in such settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.

¹ Extract from the *Bankruptcy Act*, 1908, New Zealand

“ 76. (1) An Assignee may, by summons, apply to a Judge in any case in which a husband has, within two years before the date of adjudication, erected buildings upon or otherwise improved land of his wife, or has purchased land, in her name, or provided money to purchase land in her name or on her behalf.

(2) The Judge may, upon hearing such summons, ascertain the value of the improvements, or, the amount expended or paid upon or for such land, by or on behalf of the husband, and may order the wife to pay the amount so ascertained to the Assignee.

(3) In case the wife fails to comply with such order, the Judge, by the same or a subsequent order, may direct the Assignee to sell such land with the improvements thereon, or a sufficient part thereof and to convey or transfer the same to the purchaser; and the Judge may make all vesting or other orders necessary for that purpose.

(4) The Assignee shall retain the whole or so much of the amount so ascertained as is sufficient, along with any other assets in the estate, to pay twenty shillings in the pound to the creditors of the husband, and the whole of the balance of such proceeds shall be paid to the wife or for her benefit.

(5) On any such application evidence may be given, either orally or on affidavit, or partly in both such ways and on any appeal the Court may, if it sees fit, allow further evidence to be adduced.

(6) The costs of the proceedings shall be in the discretion of the Judge.

“ 77. The provisions of the two last preceding sections shall, *mutatis mutandis*, apply to a wife who is adjudicated a bankrupt, and in any such case the word ‘ husband ’ shall be read as ‘ wife,’ and the word ‘ wife ’ shall be read as ‘ husband ’.”

“78. Any covenant or contract made by a debtor in . . . consideration of marriage for the future payment to, or for the settlement upon or for his wife or children, of any money or property wherein he had not, at the date of his marriage any estate or interest, whether vested or . . . contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, upon his being adjudicated a bankrupt before or within three months after such property or money has been actually transferred or paid pursuant to such contract or covenant, be void . . . against the Assignee.”

“By section 2 of the Act, the term ‘settlement’ used above includes any conveyance or transfer of property.”

“Section 92. An acknowledgment in writing by a creditor, or by any person authorised by him in writing in that . . . behalf, of the receipt of a part of his debt in satisfaction of the whole debt, shall operate as a discharge of the debt, any rule of law notwithstanding.”

“An Act to consolidate certain enactments of the English General Assembly relating to the adoption in New Zealand of certain of the laws of England and of the Acts of the Imperial Parliament. English Laws, Act 1908, No. 55.

“Be it enacted by the General Assembly of New Zealand¹ in Parliament assembled, and by the authority of the same, as follows :—

“1. (1) The short title of this Act is ‘The English Laws Act, 1908’. (2) This Act is a consolidation of the enactments mentioned in the First Schedule hereto.

“2. The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, so far as applicable to the circumstances of New Zealand, and in so far as the same were in force

¹Extract from the *Judicature Act*, 1908, New Zealand.

in New Zealand immediately before the commencement of this Act, shall be deemed to continue in force in New Zealand and shall continue to be therein applied in the administration of justice accordingly.

“ Provided that the laws of England relating to usury existing as aforesaid shall be deemed not to have extended to or been in force in New Zealand at any time.

“ 3. The Imperial Acts cited in the Second Schedule hereto, in so far as the same were in force in New Zealand immediately before the commencement of this Act, shall be deemed to continue in force in New Zealand and shall be applied therein in the administration of justice in like manner as the laws referred to in the last preceding section are applied.”

pua¹.

Papua.—British New Guinea became a separate possession by Letters Patent in 1888, under the British Settlement Act of 1887. A portion of the Statute Law of Queensland is expressly made applicable to this colony.

The Common Law of England was introduced by the Courts and laws adopting Ordinance (amended) of 1889 and Ordinance No. VI of 1899. The Doctrine of Consideration applies here².

The Pawnbrokers' Ordinance No. 3 of 1884 and Bills of Exchange Ordinance No. 13 of 1891, sections 27—30 deal with consideration in a bill of exchange.

Insolvency Ordinance No. 29 of 1900, section 27, deals with fraudulent settlements. In the case of a settlement made before and in consideration of marriage, whether the settlor is not at the time of making the settlement able to pay his debts without the aid of the property comprised in the settlement, or in case of any covenant or contract made in

¹ Formerly British New Guinea.

² The laws of this Colony are contained in five volumes published in 1905.

consideration of marriage for the future settlement or for settlor's wife or children of any money or property wherein he had not, at the date of his marriage, any estate or interest (not being money of or in right of wife).

If the settlor is adjudged insolvent, or compound, or arranges with his creditors, and it appears to the Court that such settlement contract was made in order to defeat or delay creditors or was unjustifiable, having regard to the state of the settlor's affairs at the time it was made, the Court may refuse or suspend an order of discharge or grant an order subject to condition.

Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage, in right of his wife, shall, if the settlor become insolvent within two years after the date of settlement, and shall, if the settlor become insolvent within ten years afterwards, be void against the assignee, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts.

Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children, of any money or property wherein he had not at the date of marriage any estate or interest, whether vested or contingent, in possession or remainder and not being money or property in right of his wife, shall on becoming insolvent before the property is actually transferred or paid pursuant to the contract be void against the assignee, etc.

Provided this subjection will not affect validity of any settlement made in good faith and for value in favour of any person not having at the date thereof any manner of notice or knowledge of such settlement having been made in contemplation or with any such intent as aforesaid. Settlement includes any conveyance or transfer of property or money.

Fiji.

Fiji.—There is no code or other body of law of non-British origin.

The Common Law of England, as it prevailed on 2nd January, 1875, prevails in the colony (41 and 42 Vict., c. 61). The legal relations between native Fijians *inter se* are governed by Native Regulations. So Fijians *inter se* are governed by their peculiar customs in matters of contracts.

There is one volume of 1880 dealing with laws and ordinances of the colony of Fiji (new ed.), 1875—1905. The Bankruptcy Ordinance, No. VI of 1889, is based on English law.

The Bill of Sale Ordinance No. III of 1879.

The Bill of Exchange Ordinance No. 11 of 1891, sections 27—30, deals with consideration.

The Doctrine of Consideration is applicable in this colony.

Queens-
land.¹

Queensland.—The Common Law of England has been in force in this colony since 1859 when Queensland was separated from New South Wales and became a separate colony.

The Statute law consists of : (a) Statute Law of England as it existed in 1828 as far as it was applicable to Australia (9 Geo. IV, c. 83, sec. 24) and so far as it is not altered or repealed by local statutes ; (b) ordinances and statutes of New South Wales up to 1859, so far as it is not repealed or altered by the Parliament of Queensland. There is no law of non-British origin in this colony. The Doctrine of Consideration applies here.

The Insolvency Act of 1874 (38 Vict. No. 5) and Amendment Act of 1876 (40 Vict. No. 12, sec. 106) deal with avoidance of voluntary settlements. (the word settlement includes conveyance or transfer of property). By section 109 conveyances are deemed fraudulent unless *bona fide* or for value.

¹*Queensland Statutes*, 5 vols., L. Woolcock,
ed. by Alfred Pain and John

The following statutes are based on English law :

The Pawnbrokers Act of 1849 ; The Bills of Sale Act, 31 Vict. No. 36 ; The Bills of Exchange ; The Gaming Act, 1850, 14 Vict. No. 9 ; The Merchant Shipping Acts 17 and 18 Vict., c. 104.

South Australia.—The Common Law of England as it prevailed up to 28th December, 1836, applies to this colony because it became a British province by 4 and 5, William IV, c. 95. There was no express authority introducing the Common Law of England at the date of the foundation of the colony in 1834¹. It is assumed that the colonists brought with them the Law of England as it was existing then in England. South
Australia

The Merchant Shipping Act (57 and 58 Vict., c. 60) is in force here.

The following statutes are based on English law :

The Bills of Exchange Act No. 4 of 1858 ; The Pawnbrokers Act No. 16 of 1852 ; The Insolvent Debtors Act No. 16 of 1860.

Mercantile Law Amendment Act enacts that consideration for guarantee need not appear by writing.

Victoria.—The Common Law of England is the Common Law of Victoria². There are special Acts about the immigration of the Chinese and their condition of labour under the Factory Acts. Victoria.

The Statutory or Enacted law of the colony consists of : (a) Acts of the Legislative Council of Victoria from 1850-1855, and Acts of the Parliament of Victoria from 1856 to the present time ; (b) Acts of Imperial Parliament in force by virtue of provisions of Act 9, Geo. IV, No. 83, section 24 ; (c) legislation of Imperial Parliament since then ; (d) Acts and Ordinances of Legislative Council of New South Wales in force on July 1st, 1851.

¹Terring on *Law Relating to the Colonies*, c. 1. p. 14.

Webb, *Imperial Law*, 2nd ed., p. 4.

²*Ibid.*, 2nd, ed., p. 6.

Consolidation of the statutes took place in 1890.

The Doctrine of Consideration applies to this colony as in English law. The Insolvency Act, 1890, section 72, deals with avoidance of voluntary settlements. It is based on English law ; the word settlement includes any conveyance or transfer of property.

The Instruments Act, 1890, sections 28—31, deals with consideration in negotiable instruments.

The following statutes are based on English law :

The Pawnbrokers Act, 1890, 54 Vict. No. 1124 ; The Seamen's Act, 1890, 54 Vict. No. 1139 ; The Merchant Shipping Act, 10th August 1854.

Tasmania. *Tasmania*.—By 9 Geo. IV, c. 83, sec. 24, the Law of England as it existed on 25th July, 1828, was made applicable to the colony except in so far as it was inconsistent with any Charter, Letters Patent or Order in Council.

There are Tasmanian statutes.

The Doctrine of Consideration applies in this colony.

The following statutes are based on English law :

The Bankruptcy Act, 34 Vict., No. 32 ; The Bills of Exchange Act, 24 Vict., No. 4, sections 27--30 (consideration for bill) ; The Pawnbrokers Act, 21 Vict., No. 23.

The Gaming Act, 55 Vict., No. 20, sec. 16, enacts that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, and all claims for money lent or advanced for the purpose of gaming shall be null and void ; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made, provided always that this provision shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or toward any plate, prize or sum of money to be awarded to the winner of any lawful game, sport, pastime or exercise,

The Merchant Seamen Act, 23 Vict., No. 7. The Voluntary Conveyances Act, 1896, enacts that voluntary settlements if *bona fide* will not be avoided under 27 Eliz., ch. 4. The word conveyance includes every mode of disposition mentioned or referred to in 27 Eliz., or Real Property Act.

Western Australia.—The Common Law of England is the Common Law of this colony. It was introduced on the foundation of the colony in 1829. Western Australia.

The enacted law consists of Ordinances from 1832-1871; Acts of Council from 1890 and Acts of Parliament from that date. All statutes of the realm of a general nature in force on 1st June, 1829, take effect here except that Usury Acts of the Federal Council of Australasia apply. There is no code or other body of enacted law of non-British origin. The Doctrine of Consideration applies in its full force. The edition of 1882 contains laws of the colony.

Bills of Exchange, 48 Vict., No. 10, sections 28—31, deal with consideration for a bill.

The following statutes are based on English law :

The Bankruptcy Act, 1892, 55 Vict., No. 32; The Bankruptcy Amendment Act, 1898; The Gaming Act, 5 and 6 Geo. IV, as adopted by 7 Vict., 13; The Pawnbrokers Act, 24 Vict., 7; Amendment was by 41 Vict. 10; The Bill of Sales Act 63, Vict. 45.

THE DOCTRINE OF CONSIDERATION IN BRITISH PROTECTORATES.

The Sudan.—The Sudan has been under the joint Sudan¹ occupation of England and Egypt since 1882.

The tendency is to adopt English law in mercantile transactions. The principles of the native commercial code as regards bankruptcy were adopted by Proclamation of 29th May, 1909.

¹*Sudan Codes and Ordinances*; Budge, *Colonial and Foreign Laws*; the *Egyptian Sudan*; Traill, *England, Egypt*

and the Sudan; *Commercial Laws of the World*, Vol. XVII—*British Possessions and Protectorates*.

The application of law is regulated by Ordinance No. 2 of 1900. That Ordinance declares how far customary and Mahomadan law will apply. Sec. 3 enacts that where in any suit or other proceeding in a Civil Court any question arises regarding: (1) succession; (2) inheritance; (3) wills; (4) legacies; (5) gifts; (6) marriage; (7) divorce; (8) family relations; (9) the constitution of *waqfs*, the rule of decision shall be: (a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience and has not by this or any other enactment been altered or abolished and has not been declared void by competent authority; and (b) Mahomadan law in cases where parties are Mahomadans, except in so far as that law has been modified by such custom. In cases not provided for by sec. 3 or any other law for the time being in force the Court shall act according to justice, equity and good conscience. The Sudan Mahomadan Law Courts Organisation Regulation issued under Order No. 1 of 1902, sec. 8, is published in the *Sudan Gazette*, No. 35.

The Law
to be ad-
ministered.

Sec. 49 declares that the decisions of the courts shall be according to the books on Personal Statutes (*Ahwal Shaksia*), by the two books of Kadri Pasha on *Real Statute and Waqfs* and by circulars issued by the Grand Kazi as a guide to Sharia Judges.

These courts are Mahomadan Courts. They have jurisdiction in questions relating to marriage, divorce, guardianship and family relationship, if the plaintiff is a Mahomadan. In other cases, unless the parties make a demand in writing to apply Mahomadan law the Court is guided by its notion of justice, equity and good conscience¹. The words justice, equity and good conscience are interpreted to mean the English Common and Statute Law in force at the time, so far as it is applicable to the circumstances of the people. Thus by implication the English Doctrine of Consideration applies in the Sudan.

¹ Ordinance No. 1 of 1902, s. 6.

A Bill of Exchange Ordinance was passed in 1909. A Bankruptcy Proclamation was passed, 29th May, 1909. The Deeds Registration Ordinance, 1907, is not affected by Court Protest Registration and Administration of Oaths Rules, passed 29th June 1909.

Cyprus.—The Common Law in Cyprus, so far as any Cyprus system of Common Law may be said to exist in the island, is the Common Law of the Ottoman Empire, which is based on Mahomadan law. Mahomadan law was introduced on the conquest of the island by the Turks in 1571¹.

The statute law of the island consists of the legislative enactments of the Supreme Porte so far as they were in force in Cyprus on 13th July 1878. The administration of this island was taken over by the British in 1878.

From 13th November 1882, legislation of the island is embodied in Ordinances.

The Cyprus Courts of Justice, Order 1882 (as amended in 1902), enacts that Ottoman law will apply to Ottoman subjects and English law to English subjects. In Ottoman actions the Common law of the Ottoman Empire, as altered or modified by Cyprus Statute law, applies. In *Parapano v. Happas*, 1894, A. C. 165, 169, Lord Hobhouse said: "When the Turks conquered Cyprus that island had been nearly four centuries in the hands of adherents of the Latin Church. The conquerors did not enforce all Mahomadan usages on their Christian subjects, but they allowed non-Mussulman sects to be governed by their own laws in divers matters connected with religion and domestic life." Thus it is quite clear that the Doctrine of Consideration or *Causa* does not obtain in Cyprus, and agreements are governed by the law of the Ottoman Empire as between the Mahomedans; but when the parties are not Mahomedans the contracts are governed by English law.

¹*Journal of Comparative Legislation*, 1900, p. 27.

Statute No. 7 of 1886 [sec. 2 (1)] and the Fraudulent Transfers Avoidance Act, 1886, enact:—(1) That every gift, sale, pledge, mortgage or other transfer or deposit of any moveable or immoveable property made by any person with intent to hinder or delay his creditors, in recovering from him their debts, shall be deemed fraudulent. (2) Every transfer or assignment of any property made otherwise than in exchange for money or other property of equivalent value shall be deemed fraudulent for the purposes of this law, if it is made to any parent, spouse, child, brother or sister of the transferor or assignor. (3) No sale, mortgage, transfer or assignment made in exchange for the money or other property, of equivalent value, shall be voidable under the provisions of the law unless the purchaser, mortgagee, transferee or assignee shall be shown to have accepted, it with knowledge that such sale, mortgage or transfer was made with intent to delay or defraud his creditors.

Section 3 (1).—Any gift, sale, pledge of any moveable or immoveable property deemed to be fraudulent will be set aside by order of the court, to be obtained on the application of any judgment creditor.

(2) No gift, sale, mortgage or other transfer of any property shall be set aside except it shall have been made within one year next before the commencement of action. This provision is based on the English statutes 13 Eliz., c. 5, and 27 Eliz., c. 4.

The Gambling Act, No. 10, of 1896, section 8 enacts that no person shall be able by any process of court to recover any debt or claim which shall arise out of any lottery or gambling transaction.

Cyprus has a Negotiable Instruments Act, No. 5, of 1886, based on the English Bills of Exchange Act.

Summary.

To sum up the results of the Doctrine of Consideration as it is applied and accepted in the Colonies and protectorates of Great Britain :—

The Doctrine is accepted and followed as it is in England ; but it is very difficult to say how far the technical rules which are the result of judicial decisions in each

colony have been regarded as the current law in each place. Presumably the courts follow the rules of equity and conscience and this means that English rules of practice and procedure are called in aid to give effect to the just and expressed intention of the parties.

In the law of property the doctrine is accepted in its entirety ; but here again the incidents of land tenure must be considered. The rules of Common Law and equity apply and the Judicature Act has been adopted in the colonies, so there are no separate jurisdictions, but the rules of law and equity are followed as in English Courts and rules of practice and procedure are taken from annual practice, as may be seen from the constant reference to it.

There are special Acts passed which are based on English statutes. Commercial law is quite uniform and the tendency is more and more to accept the English Doctrine of Consideration on broad lines.

CHAPTER VI.

COMPARISON OF THE DOCTRINE OF CONSIDERATION IN THE LAW OF ENGLAND AND THE UNITED STATES OF AMERICA.

The general principles of the Common Law of England prevail in the United States of America. By Common Law is meant those maxims, rules and forms of proceedings which are not derived from any written law but are the outcome of the dictates of reason and nature ; those maxims consist of the usages and customs of the English-speaking race. Roman Civil Law is opposed to Common Law. Abott in his dictionary describes Common Law to be the rules in any country which are applicable to all places as opposed to the laws of any particular place. Blackstone¹ says the Common Law is the reason dealing by the light of experience in human affairs.

The framers of the Constitution of the United States of America laid it down as a fundamental rule that trial by jury shall be observed in suits at Common Law ; they further contemplated that suits at Common Law were not to be confined to old and settled proceedings ; but were to be extended to cases in which legal rights were to be determined in contradistinction to equity and admiralty jurisdiction.

In England the Common Law has its origin in ancient customs, originating in Acts of Parliament which were not reduced to writing. It is founded on the principles of justice which Blackstone called the perfection of reason. Sir Mathew Hale in the Preface to Rolle's *Abridgment* writes : "The Common Law is not the product of the wisdom of some one man or society of men in any one age, but of the wisdom, counsel, experience and observation of many ages of wise and observing men."

¹ *Com*, p. 472.

The Common Law in the United States of America is made up of the Common Law of England and of the customs and usages which are peculiar to the people of the United States. The principles of the Common Law of England are not to be exclusively applied to another country or society ; but owing to their inherent qualities of expansibility and adaptibility it is quite possible to apply them in a modified form to any other country. Common Law includes general customs and particular laws. In England it includes the general customs of the whole realm and also particular laws which have been incorporated in Common Law ; it also includes Christianity. Lord Hale said : “ Christianity was part and parcel of the law of England.” In the United States there is a difference of opinion on this point. In some States the English rule that the Christian religion forms part of the Common Law is accepted ; while other States do not completely accept the Common Law of England, *e.g.*, United States Federal Court, New York, Pennsylvania, Massachusetts, etc. The English Common Law has been accepted with reservation. Story¹ J. said : “ The Common Law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed them as their birth right, but they brought with them and adopted only that portion which was applicable to their condition.” Watkins C. J.² said : “ Our English ancestors brought certain fundamental principles of Common Law. But it cannot be said that the great body of the Common Law of English statutes passed in aid of it, has prevailed in the Colonies. Reported cases must be looked to, in order to determine the extent of adoption.” It has been held that there is no union of Church and State in America. The Legislature controls exclusively both temporal things and Christian institutions and there is no other system of religion forming part of the Common Law. Law has not given any sanction to Christianity

¹I. Van Hoes v. Pacard, 1829, 2 Pet. 137.

²Cox v. Morrow, 14 Ark 603.

in the United States. In the *Board of Education v. Minor*¹ an intermediate view was held, *viz.*, that acts conducive to subvert the Christian faith or acts which are calculated to bring ridicule and attacks on religion are temporal offences. In England Law Merchant is part of Common Law and the same is the case in the United States.

It follows that there is no such thing as American Common Law because several States of the Federal Government are quite sovereign and independent, having peculiar customs and laws. The only way to incorporate Common Law into each State, is by legislative enactment. In the *United States v. Warrell*² Chase J. said: "If indeed the United States can be supposed for a moment to have a Common Law, it must be of England: and it is impossible to trace when or how the system was adopted or introduced. There is a great and essential diversity in the subjects to which it is applied and in the extent of its application. So the Common Law of each State is not the same, but the Common Law of England is the law of each State so far as each State has adopted it."

Broadly speaking those English Statutes which were passed in England before the emigration in 1615 still continue in aid or amendment of the Common Law, provided they are not repugnant to the constitution of the United States and they form part of Common Law there.

Caton C. J. said³: "The Law Merchant first originated in custom among commercial men, who by common consent adopted such rules and regulations as they found the wants and necessities of commerce required; and as commerce was extended, it spread itself over the kingdom, till it became as universal as any principle of Common Law." At first the Court required proof to be given, till it became so very similar to Common Law that one cannot be distinguished from the other till at last

¹ 23 Ohio State, p. 211.

² 2 Dall U. S. 384.

³ Cook v. Renich, 19 Illinois, 598.

it merged in Common Law. The presumption is that Common Law prevails in several States and the party who denies its existence has to prove it as an ordinary fact. In Louisiana the Common Law of England has never been accepted¹. The use of English terminology is no proof of the use of English Common Law there. In Texas English Common Law does not prevail because it was part of Spanish possessions². Indian territory settled by subjects of other nations than England is not subject to Common Law at all. In *Davison v. Gibson*³ discussion arose as to the applicability of English Law. The parties were Indians. As a general rule one State will presume that Common Law prevails in a sister State, but this rule will not go the length of assuming that English Common Law is in force⁴. Prof. Reinsch refutes the old view that the law of England, both Statutory and Common Law, was brought by the settlers to the Colonies and so far as applicable was from the first fully enforced in all cases where local legislation had not superseded the English Common Law. He holds that this view is not borne out by the facts of early colonial history because simple codes were adopted as needs arose among the colonists and they in turn took the place of the English law. This is true of New England Colonies. In 1636 in Massachusetts a demand was made to the Government to make laws agreeable to the laws of God. The Body of Liberties (1641) contains a similar request. In the early records of Massachusetts the Scriptures were frequently cited while English Common Law was regarded as illustrative of the law of God. In Connecticut and New Haven a similar development is to be seen. New Hampshire

¹ 16 *Harv. L. R.* 342;
Howe, *Roman and Civil Law in America*; *Introduction to Saunders's Civil Code of Louisiana*, 1909.

² See 23 *Harv. L. R.* 579;
Munro, *Genesis of Roman Law in America*.

³ 56 *Fed., Rep.* p. 443.

⁴ *English Common Law in Early American Colonies* by Prof. Paul S. Reinsch in *Selected Essays, Anglo-American Legal History*, Vol. 1, pp. 43.

and Vermont have given greater authority to English Statutory and Common Law. Prof. Reinsch concludes that "the process which we may call the reception of the English Common Law by the Colonies was not so simple as the legal theory would lead us to assume. While the general legal conceptions were freely used, the early colonists did not adopt the technical rules of the Common Law of England. In *Forepaugh v. Delaware, etc., Railroad Co.*¹, it was decided that Common Law includes the general customs of the realm, and particular laws which by custom are used by particular courts, but does not include particular customs affecting the inhabitants of particular districts. It includes Law Merchant also.

The accepted view is that Acts of Parliament passed prior to 1607 in aid or amendment of the Common Law are part of the Common Law². In the majority of States only the Acts of Parliament passed prior to 1607 are adopted. Other States reckon up to 4th July, 1776, when the Declaration of Independence was proclaimed, because English Acts then ceased to be binding in American States³.

The Doctrine of Consideration is an integral part of the Common Law of England and it is so regarded in the United States of America with certain modifications. Consideration of a contract or deed is that which the law regards as motive or inducement for making it. Langdell⁴ defines consideration of a promise as a thing given or done by the promisee in exchange for the promise. Abott's *Law Dictionary* describes consideration as a material cause which moves the party to agree. But the Doctrine of Consideration is modified in several points in the law of the United States of America and is freed from the highly technical rules of English law.

¹ 1889, 128 Pa. St. 217.

² *Commonwealth v. Knowlton*, 180, 72 Mass. 530.

³ *Commercial Laws of the World, United States of*

America Specially Parts I—XII, Vol. VII.

⁴ *Summary of Law of Contracts*, sec. 45.

In determining the validity of contracts there is a difference in the views adopted by the courts of different States of America. The general rule is that the law of the place of making the contract should determine its validity or invalidity (*lex loci contractus*), but this general rule is departed from.

Colorado, Indiana, Maryland, Massachusetts, Tennessee and West Virginia allowed the law of the place of the contract to govern the dispute; while Alabama, Arkansas, California, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Michigan, New Hampshire, New Jersey, Ohio, Pennsylvania, and South Dakota allow the law of the place of performance to determine the validity; while England and English colonists and Connecticut, the District of Columbia, Illinois, Nebraska, New York, North Carolina, North Dakota, South Carolina, Texas, Virginia, Washington and Wisconsin accept the rule that the validity of contract should be determined by the law which the parties intended at the time of making the contract¹.

Classification of Consideration.—Firstly, consideration is classified according to its nature into valuable, Classification of Consideration. moral good.

Valuable consideration may consist of some right, interest, profit or benefit accruing to the party who makes the promise, or some forbearance, detriment, loss, responsibility, act, labour or service, given or suffered or undertaken, by the party to whom it is made.

The above definition enumerates instances in which it is applied. The principle seems to be that valuable consideration consists in a relinquishment by the promisee of some legal right. It follows that any benefit or detriment is not absolutely necessary. But there must be actual relinquishment or promise to relinquish the exercise of some legal right.

Secondly, consideration may be classified according to its power to sustain contracts, *e.g.*, as to time of

¹ Beale, *Conflict of Laws*, p. 49.

performance (a) concurrent, (b) executed, (c) executory, and (d) continuing.

A third way of classifying consideration is based on its being express or implied.

Fourthly, we may classify consideration in respect to its object—legal or illegal.

A fifth mode of classification is in respect of its capacity of performance, *e.g.*, possible or impossible.

Good consideration is defined to be that of blood or natural affection between near relations¹; it will operate between husband and wife²; parent and child (child includes step-child); but not between father and illegitimate child because the child is *nullus filius*. In North Carolina an illegitimate child may inherit from the mother and so there is good consideration³. Relationship between uncle and nephew being collateral, is not regarded as constituting good consideration. Though the writers on real property favour it, the cases decided by the courts do not countenance that relation as good consideration⁴; but the relationship between father-in-law and son-in-law is good consideration. In English law the relation extends only to the legitimate issue of marriage and spouses⁵.

In concurrent consideration the giving of promise and the passing of consideration are simultaneous.

In executory consideration, consideration arises after the promise is made; while in executed consideration it precedes the promise.

Executed consideration is no consideration in law, for any other promise than that which the law will imply⁶.

¹ 2 *Black Com.* 296.

² 41 *Tex.*, 111.

³ 66 *N. Car.*, p. 223.

⁴ Washburn, *Real Property*,
Vol. II, p. 420.

⁵ Williams, *Real Property*,
(20th ed.), p. 78.

⁶ *Rascorla v. Thomas* (1842),
3 Q. B. 234.

When consideration both precedes and succeeds the making of a promise it is said to be continuing, *e.g.*, a consideration which is executed in part only is called continuing consideration and is valid, the executory part of it is sufficient to support the entire promise.

A promise to pay the debt of a third person is void unless there be some consideration other than that which he already moved, *e.g.*, Alabama (67 *Ala.* 461); California (12 *Cal.* 286); Maine (33 *Mo.* 201); Vermont (66 *Ver.* 415). To become a surety after the note is delivered is to be without consideration, *e.g.*, Alabama (112 *Ala.* 508); California (80 *Cal.* 139); Iowa (48 *Iowa* 550). If service be done voluntarily to the promisor, there cannot be any liability to pay on the part of the promisor; but it is otherwise if service be done at his request.

A.—COMPARISON OF THE RULES OF CONSIDERATION IN THE LAW OF CONTRACT IN ENGLAND AND THE UNITED STATES OF AMERICA.

RULE I.—In every contract valuable consideration is essential. This is the accredited Rule in every State of the United States except Louisiana.

In *Mills v. Wyman* [3 Pick (Mass) 207] Parker C. J. said: "If moral obligation in its fullest sense is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do generally, he ought to be made to do whether he promise or refuse. But the law of society has left most of such obligations to the interior forum. It is only when the party making the promise gains something or he to whom it is made loses something that the law gives the promise validity."

In Louisiana, where the law of France obtains, the rule is that a contract to be enforceable must have a *causa*; but consideration is not required. The Civil

Code of Louisiana¹ enacts that 'an obligation without a cause or with a false cause or unlawful cause can have no effect'. In contracts of mutual interest, the cause of engagement is the thing given or done or engaged to be given or done, or the risk incurred by one of the parties; in contracts of benevolence, the liberality which one party shows towards the other is sufficient consideration. But when an engagement has no cause or consideration or when the cause is false, the engagement is null and the contract based on it is also null and cannot be enforced². In *Blout v. Blout*³ Taylor C. J. said: "The distinction between a deed and a parol contract is well settled at Common Law and upon the basis of sense and justice. The inconsiderate manner in which words frequently pass from men would often betray them into acts of imprudence and not infrequently expose them to the artifices of fraud where they are not placed under the safeguard of the rule that parol contracts must have a consideration. In the case of deeds the ceremonies which accompany it serve to enable a man to avoid either surprise or imposition. In the following States consideration of some kind is required to form a contract, as in England, and *Rann v. Hughes*, 7 T. R. 346, is good law in those States:—

United States Federal Court (1 Woods U. S. 680); Alabama (98 *Ala.* 258); California (59 *Cal.* 138); Colorado (8 *Colo. App.* 71); Connecticut (5 *Conn.* 555); Georgia (89 *Ga.* 117); Illinois (140 *Ill.* 269); Indiana (96 *Ind.* 98); Kentucky [2 Bibb (*Ky.*) 424]; Massachusetts (15 Gray *Mass.* 267); Michigan (33 *Mich.* 99); Minnesota (38 *Minn.* 426); Missouri (32 *Mo.* 197); Montana (10 *Mont.* 124); New Hampshire (64 *N. H.* 493); New Jersey (49 *N. J. Eq.* 452); New York (37 *N. Y.* 164); North Dakota (*N. Dak.* 1896); 68 *N. W. Rep.*, 82; Ohio (20 *Ohio* 340); Pennsylvania (1 *Pa. St.* 445);

¹ Wolff's *Revised Laws*, 2 *Ama.* 192.
vols., 1904; Suppl. 1910, sec. 1887.

² 2 *Law Reports, North Carolina*, 587.

³ *Moulton v. Noble*, 1 *La*

South Carolina (32 *S. Car.* 238); Tennessee Cooke (Tenn. 497); Texas (1 *Tex.* 162); Vermont (10 *Vt.* 181); Virginia (6 Leigh *Va.* 85); Hawaii (6 *Haw.* 134).

The plaintiff must prove that he has given consideration. To this general rule: (1) Bills of exchange and promissory notes form an exception. In negotiable instruments consideration is presumed and all indorsements thereon *prima facie* are presumed to be for value. (2) In written contracts generally presumption of consideration is raised by statutes. Several States have enacted that contracts reduced to writing and signed by the party to be charged thereby will be presumed to be for valuable consideration. This is not the view of law in England. There is no such division of contracts as those under seal, writing and oral. If the contract is not under seal, it is simple contract and must have consideration.

Consideration is presumed in written contracts in the following States by express enactment: In *Carolina* it was enacted that written instrument is presumptive evidence of consideration. *Toomy v. Dunphy* (86 *Cal.* 639).

In *Texas* a written contract imports consideration and the filing of a reply by plaintiffs under oath, alleging that the contract set up as a defence without consideration does not shift on the defendant the burden of proving the consideration². By statute it is declared that every contract made in writing imports consideration in Texas. Though the statute declared that a written contract raises the presumption of consideration, it will not arise if there is on the face of it no consideration³.

The *Alabama* Civil Code⁴ enacts that all written contracts which are founded on a suit import consideration

¹ By Civil Code, *Dooring's Codes*, Vol. V, sec. 1614.

³ *Ibid.* 7 *Texas Civil App.* 57.

² *Gulf, etc., Ry. Co. v. Hughes* (Tex. Civil App. 1895) 31 S. W. Rep. 411.

⁴ *Alabama Code*, 3 vols., 1908, sec. 2769.

(65 Ala. 558). A covenant which is not founded on a suit but which is set up as a defence does not import a consideration¹.

The *Florida* Revised Statutes, 1906, sec. 1073, enact that "all bonds, notes, covenants, deeds, bills of exchange and other instruments of writing not under seal shall have the same force and effect (as far as the rules of pleading and evidence are concerned) as bonds and instruments under seal."

The Code of *Tennessee*² enacts that all contracts in writing hereafter made and signed by the party to be bound or his authorised agent and attorney are *prima facie* evidence of consideration.

In some of the States the statute raises the presumption of consideration in favour of contracts for payment of money or property only, *e.g.*, the *Missouri* Revised Statute, 1906, sec. 663, enacts that all promises in writing for the payment of money or property, whether conditional or absolute, import consideration³. An *Illinois* statute⁴ enacts that an instrument in writing for the payment of money imports consideration.

The Uniform Negotiable Instruments Law is based on the English Bills of Exchange Act, 1882. The American Act is confined to negotiable instruments and requires that the instrument be expressly made payable to order or to bearer. The American Act provides that the addition of a clause promising to pay costs of collection or fee of attorney in case of payment not being made at maturity, shall not invalidate the instrument : if the holder is given option to elect to require something to be done instead of making payment by money, it will not affect the negotiability of an

¹ *Koop v. Kofly*, 29 Ala. App. 551
322.

² *Shannon's Code*, 1897, 1909, case of *Goodwin v. Goodwin* 65 Illi. 497.
sup. 1904, sec. 3214.

³ *Wulse v. Schaefer*, 37 Mo.

⁴ *Hurd's Revised Statutes*,

instrument¹. Justice Story in *Swift v. Tyson* (16 Peters 1) said: "The law respecting negotiable instruments may be truly declared to be in a great measure not the law of a single country only, but of the whole commercial world²."

The Negotiable Instruments Law was first adopted in 1897. It is now in force in every State by express enactment.

Unless specially required by statute, it is not essential that consideration should be mentioned. An instrument is negotiable although it does not express the value given or state that any value has been given therefor. It is enacted that in certain cases consideration must set out to determine validity of notes given for the purchase of patent rights. As between the immediate parties to the instrument, consideration is required.

Section 50. Every instrument is deemed *prima facie* to have been issued for valuable consideration; and every person whose signature appears therein to have become a party thereto for the value.

Consideration in negotiable instrument in U. S. A.

Section 51. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time. The Wisconsin Act enacts that value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt, discharged, distinguished or extended, constitutes value; and is deemed such, whether the instrument is payable on demand or at a future time. But the

¹Parsons, *Bills and Notes*; Daniel, *Negotiable Instruments*; Story, *Bills of Exchange*; Jenks, *Early History of Negotiable Instruments*, 9 *Quarterly Law Review*, 70. Sir N. Chalmers read a paper entitled "Comparison between

the American Act and English Bills of Exchange," before the Institute of Bankers in January 1909.

²Borchardt on *Statutory Enactments of all Countries Relating to Bills of Exchange*

endorsement or delivery of negotiable paper as collateral security for a pre-existing debt without other consideration and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value.

Section 52. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties which became such prior to that time.

Section 53. Where the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Section 54. Absence or failure of consideration is matter or defence as against any person not a holder in due course ; and partial failure of consideration is a defence *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

Section 55. An accommodation party is one who has signed the instrument as maker, acceptor or endorser without receiving value therefor and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value notwithstanding that such holder at the time of taking knew him to be an accommodation party.

The Illinois Act says that an accommodation party is one who has signed the instrument as maker, drawer, acceptor or endorser for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding that such holder at the time of taking the instrument knew him to be only an accommodation party, and in case a transfer after maturity was intended, to be an accommodation party, notwithstanding that such holder acquired title after maturity.

RULE II.—Valuable Consideration must consist of some legal detriment at the desire of the promisor.

The essence of Consideration is in relinquishing some right which can be lawfully exercised or enforced. Hence benefit or detriment is not necessary. The payment of money may be the result of pre-existing legal and equitable obligation. It may be liquidated legal obligation, *e.g.*, debts which may be sufficient to raise an implied promise to pay.

Consideration and motive are distinct because in *assumpsit* Consideration need not constitute the whole or part of the motive for making the promise; in debt there is no distinction between them¹. This rule is exactly similar to the rule in the law of England and English cases are followed by way of illustration only. The underlying principle of Consideration is that business engagements are in the last analysis reducible to bargain or exchange. It is a thing which the promisee gives in exchange for the thing promised. Nothing is a Consideration which is not treated as an item of exchange by the parties. In *Fire Insurance Association v. Wickham* (1891, 141 U. S. 564) it was held that the mere presence of some incident to a contract which might under certain events be considered Consideration for the promise, could not necessarily make it Consideration in that contract. If money is promised for charity, that promise is valid, but if money is expended on reliance of that promise and liability arises, action can be brought².

RULE III.—From, to whom, at whose instance Consideration must move.

In *Thomas v. Thomas* (1842, 2 Q. B. 851) it was decided that in England Consideration must move from the plaintiff. In *Tweddle v. Atkinson* (1 B. and S. 398) it was decided that the action was not maintainable because the plaintiff was a stranger to the agreement.

¹Langdell, *Summary of Contracts*, sec. 60.

²*Presbyterian Church v. Cooper* (1889), 112 N. Y. 517.

This English rule is accepted in Massachusetts (107 Mass. 37) and North Carolina [8 Jones L. (N. Car.), p. 222] but is not accepted in the United States and an action is allowed on a promise made by the defendant to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the Consideration¹.

In *Knowles v. Erwin* [43 Hun. (N. Y., 150)] the father executed a deed of all his property in favour of his son in Consideration of a contract by the son to pay a certain sum every year to the grantor's daughter. The court decided that there was sufficient Consideration between the parties to enable the daughter to maintain action against the son upon his contract. In *Lamb v. Donovan* (19 Ind. 40) *A* conveyed his land to *B* and in Consideration of that, *B* agreed to maintain *A* and his wife during their lives, and after their death to pay to a third person a certain sum of money. The court decided that a third person can sue for that sum².

The American rule is similar to the rule in Anglo-Indian law.

**Strangers
to contract.**

As to whether strangers to a contract can have rights thereunder. In simple contracts the promise determines the Consideration and extends to the person who gives it. Exceptions: (1) if Consideration is given by the plaintiff's agent with the authority of his principal. In Massachusetts the English rule is accepted. (2) Where the beneficiary was related to the promisor. This is not accepted in England or in Massachusetts, but is recognised in New York³, and in Illinois⁴. In *Lawrence v. Fox* (20 N. Y. 268) it was decided that

¹ The United States Federal Court (93 U. S. 143); Alabama (31 Ala. 724); Arkansas (46 Ark. 132); California (67 Cal. 293); Colorado (5 Colo. 18); Illinois (107 Ill. 87); Kansas (33 Kan. 109); Kentucky (2 A. Ky. Marsh Ky. 495); New York (95 N. Y. 372); Rhode Island (15 R. I. 518);

Wisconsin (66 Wis. 57).

² In 15 *Harv. L. R.* 767, Prof. Williston discusses contracts for the benefit of third persons.

³ *Buchanan v. Tidden*, 158 N. Y. 109.

⁴ *Lawrence v. Oglesby*, 178, Illi. 122.

where one person makes a promise to another "for the benefit of a third person, that third person **may** maintain an action upon it."

Where the contract is for : (a) the *benefit* of a third person (20 N. Y. 268) and (b) the performance of the contract must go to discharge some legal obligation of the promisee to the party suing. In *Benge v. Hiatt* (82 Ky. 666) it was decided that when a father of an illegitimate child made a contract with the mother to support that child, an action by that child against the father for the performance of the contract made with his mother was proper. In a life insurance policy the beneficiary has a right to sue for the money. In Massachusetts he cannot as a general rule ; but as beneficiary to enforce life insurance policy he can sue, because taking out a policy is deemed to be a declaration of trust. In New York it is declared that "to maintain the action by a third party there must be some liability to him on the part of the promisee." If the case does not fall within these two classes, a stranger cannot sue upon it, even though he might be benefited by the performance of the contract.

To what contracts the rule applies.

This right of third party to sue can be justified on three views : (1) trust, (2) novation, (3) subrogation.

(1) In this view there is an extension of the idea of trust. The statutes of many States provide that 'the real party in interest' must sue, and the courts have interpreted that beneficiary is the 'real party in interest.' In Missouri promisee is declared trustee for beneficiary¹. In Indiana it was decided that there was executed a gift of promise to the beneficiary². In *Bay v. Williams* (112 Ill. 91) it was decided that such a promise invests the person for whose use it is made with an immediate interest and right as though the promise had been made to him.

¹Grandall v. Payne, 154 Ill. 627.

²Pruitt v. Pruitt, 91 Ind. 595.

(2) The novation theory is adopted in New Hampshire. In *Warren v. Balchelder* (16 N. H. 580) it was decided that if there is novation, the third party can sue. In Maine it was held that the beneficiary must be specially designated¹. The State of Rhode Island hesitates between those two theories and holds that third party can sue only if he is one of the parties². In the Federal Courts the doctrine is unsettled. The general rules laid down in the Supreme Court coincide with the rules of Common Law³.

It is not essential that Consideration when it moves from the promisee should directly pass to the promisor in order to enforce a contract. If it moves from the promisee to a third person at the promisor's request, it is quite sufficient for the purpose.

It is quite clear⁴ that if goods be supplied to a third person at the promisor's request, there is Consideration sufficient in law to sue on the promise. In *Gerhard v. Bates* (2 El. and Bl. 476) Lord Campbell C. J. said : ' There is entire want of Consideration for the promise. It is not stated that from the plaintiff's buying the share, any benefit accrued to the defendant or any detriment was suffered by the plaintiff at the time of entering into the contract. A prejudice to the promisee incurred at the request of the promisor may be a consideration as well as a benefit to the promisor proceeding from the promisee ; but this must be a prejudice on entering into the contract, not a prejudice from the breach of it.'

The American law allows a third party to sue. This principle has been developed in New York, where the rule is that a third party for whose benefit a contract is made, can sue the promisor (150 N. Y. 232). The Courts

¹*Cumberland v. St Clair*, 13 Court (29 Fed. Rep. 175) No. 35. Alabama (97 Ala.) 364 ; Colo-

²*Wood v. Moriarty*. 15 R. rado (6 Colo. App. 122) ; I 518. Illinois (59 Ill. App. 497) ;

³*Harriman, Contracts*, Chapter XVI. Iowa (77 Iowa 545) ; Minnesota (64 Minn. 211 ; New

⁴*United States Federal York* (126 N. Y. 293.)

are not entirely satisfied with the doctrine and hold that the contract must be entered into : (a) for the *benefit of a third party* or (b) at least such benefit must be the direct result of performance, and (c) within the contemplation of the parties. There must be some legal duty on the part of the promisee to that third party. The theory is that the obligation so connects that stranger with the contract as to be a substitute for any privity with the promisor. Incidental benefit has been held not sufficient (47 N. Y. 233). In *Vrooman v. Turner* (69 N. Y. 280) the Court decided : "There has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. In every case there must be a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit." The New York view is accepted by other States with the limitation that incidental benefit cannot be sufficient. There must be a direct object to benefit a person to entitle him to sue and the promisee must be under a legal duty to him. In *Clodfelter v. Hulett* (72 Ind. 142) it was held : "It has been many times decided that a promise made by one to another from whom the Consideration moves for the benefit of a third person may be sued on by the party for whose benefit the promise was made." In *Gooden v. Rayal* (85 Iowa 592) it was decided that a minor can sue for damages for the breach of a contract made by his parents in his behalf¹.

In Connecticut *Melch v. Ensign* (49 Conn. 191) it was decided that actions upon contracts must be brought by the party making the contract and from whom the Consideration moved. But exception exists in "those cases in which the parties confessedly contracted for the benefit of third persons not incidentally, but as principal object." The case of

¹Louisiana Civil Code, sec. 1890, adopts this rule; Mississippi (49 Miss. 19) Missouri (58 Mo. 508); Rhode Island (17 R. I. 295); Wisconsin (85 Wis. 564) follow a similar rule.

Dutton v. Poole was commented on as an exception to the rule and it was decided that "if that case came in modern times in this country, it would be good law, because the promise was intended for the benefit of the daughter as its object." Mere incidental benefit to be derived by a third party from a contract is not sufficient to give a right of action upon it, *e.g.*, if a debtor makes a promise to his creditor to pay the debt to a third party, that third party cannot sue to recover the money; but if *A* pays money to *B* for the use of *C* or if *A*, having money belonging to *B* agrees with him to pay it over to *C*, in each of these cases an action can be brought in the name of the person beneficially interested.

In Pennsylvania the tendency is to confine the exceptions to cases in which a third person, although no party to the contract, may be fairly said to be a party to the Consideration on which it rests.

In Virginia the point is not quite settled. The right of a third party to recover is subject to equities between the original parties. Contracts under seal are an exception and the third person can sue on a sealed contract. This is not the accepted rule in all States; the distinction is not accepted and the rule is applied to sealed and unsealed contracts alike.

Langdel¹ says one of the striking differences between debt and assumpsit in respect to Consideration is that in debt the Consideration must inure for the benefit of the debtor, while in assumpsit it may inure to the benefit of the promisor or of some third person, or to the benefit of no one. It was by degrees that this difference between debt and assumpsit was developed. To sum up, in the United States of America, a beneficiary's right is recognised: (*a*) where the express object the contract is donation to the third person; and (*b*) where the performance of the contract goes to discharge some legal or moral

¹*Summary of Contracts*, Sec. 45.

obligation of the promisee to the beneficiary. The law establishes privity and implies a promise on which obligation is based.

RULE IV.—The act or forbearance constituting Consideration for the promise must be of some value in Law ; it need not be adequate to the promise.

This rule obtains both in England and the United States of America¹.

A good or meritorious Consideration will not support a simple contract². A pre-existing moral or conscientious obligation on the part of the promisor to do the thing promised is not sufficient Consideration³. Although Consideration must be of some value in the eye of law, it need not be adequate in point of value.

(a) At law courts do not weigh the quantum of Consideration, but leave the parties to judge the benefits to be derived from the promises⁴. This is true in the States of America⁵. In *Whitefield v. M'Lood* (2 Bay S. Car. 380) it was decided that "the adequacy of Consideration is not *alone* any ground for setting aside a contract solemnly entered into. Adequacy or inadequacy of Consideration depends on the idea of men in relation to the objects of their contracts and the views and purposes with which they are entered into ; there is no fixed standard by which to settle." Smith says⁶ : "The case of *Thornborow v. Whiteacre* (2 Ld. Raym 1164) presents a

¹United States Federal Court (2 Pot. U. S. 170) ; Alabama (40 Ala. 134) ; Arkansas (10 Ark. 585) ; Massachusetts (139 Mass. 550) ; Missouri (34 Mo. 513) ; North Carolina (98 N. Car. 67).

²Pennsylvania (1 Pa. St. 445) ; Vermont (21 Vt. 238).

³Indiana (15 Ind. 59) ; Iowa [4 Greene (Iowa) 106] ;

New York (24 Wond. N. Y. 97).

⁴2 *Blackstone Com.* 445.

⁵United States Federal Court (2 How. U. S. 426). Alabama (11 Ala. 386) ; Indiana (2 Int. 442) ; Massachusetts (1 Met. Mass. 84) ; New York (8 Cow. N. Y. 406).

⁶*Contracts*, p. 179.

strong example of the reluctance of the courts to enter into a question as to the adequacy of Consideration."

(b) In equity court will not interfere on the ground that the bargain is unreasonable.

The California Conveyancing Act (sec. 26) defines the words valuable Consideration as a pecuniary Consideration or its equivalent, as distinguished from a good Consideration, and has no reference to the adequacy of the price or value of the property conveyed.

Specific performance of a contract will not be denied owing to inadequacy of Consideration. This is also the rule in England.

The parties are themselves the best judges of adequacy of Consideration¹ and therefore mere inadequacy if not so gross as to prove fraud or imposition will not warrant the refusal of relief. California Civil Code, (sec. 3391) enacts that specific performance cannot be enforced against a party to a contract in following cases: (1) if he had not received an adequate Consideration for the contract; and (2) if it is not as to him just and reasonable².

Gross inadequacy of Consideration will raise a presumption of fraud; the inadequacy must be so gross as to shock the conscience and will be evidence of fraud³.

In England a deed will not be set aside owing to inadequacy of Consideration⁴. In *Lawrence v. McGalmore* (1844. 2 How. 426) Story J. said: "A Con-

¹Adam's *Equity* p. 78; 765); New York (3 Cow United States (31 Fed. N. Y. 590).

Rep. 369); Massachusetts (104 Mass. 420); New Jersey (24 N. J. Eq. 70); New York (21 Barb. N. Y. 381).

²United States (27 Fole. Rep. 827); Alabama (10 Ala,

³United States [19 How. (U.S.) 303]; New York (4 Barb. N. Y. 376).

⁴Harrison v. Guest (8 H. L. Cases 481).

sideration of one dollar is just as effectual as a larger sum stipulated for or paid. A valuable consideration, however, small or nominal, is sufficient to support a contract of guarantee or any other contract."

RULE V.—Consideration for the promise may be illegal, impossible or contrary to public policy.

If the consideration for a contract is illegal as between the parties, no effect is given either at law or in equity. This is true of the law of England and of the United States¹.

If the legal and illegal considerations can be separated, effect can be given to the legal part only. If the agreement be executed, the Court will not rescind it, but if it is executory, its execution will not be aided by the Court. In *Raquet v. Roll* (7 Ohio Pt. 11, 70) Grimke J. said: "The distinction between executed and executory contract where the consideration is unlawful is a plain one. In the former case, the Court will not annul it; in the latter case they will not enforce it."

The mere knowledge on the part of a vendor that the purchaser in contracting to buy is furthering an unlawful object will be no defence in an action for the price. But if the object is known to the seller, the Court will not grant any relief².

At Common Law such contracts were valid unless Gaming and wagering contracts. indecent. Now the public policy regards them as against good morals³. Exception is made in the case of prices to be awarded to a winner of games or in contests of skill⁴. Stock Exchange Contracts are determined by reference to the real intention of the parties. The test of the validity of contracts in buying and selling on a margin is whether the parties intended

¹United States (27 Fed. (1904, 35 Tex. Civ. App. 433). Rep. 909); Alabama (69 Ala. 98); New York (51 N. Y. Superior Courts 88).
²Jones v. Atkin and Atkin 175 Mass. 581.
³Love v. Harvey (1873, 114, Mass. 80).
⁴Wilkinson v. Stett (1900),

to settle only in *money* and in no other way ; or whether the party selling could tender and compel the acceptance of the commodity sold ; or whether the party buying could compel the *delivery* of the commodity sold. Under the rules of the New York Cotton Exchange, all sales or purchases for future delivery of cotton contain provision that there must be actual delivery of cotton if this be required. In the California Constitution (Art. IV, 326) it is enacted that " all contracts for the purchase or sale of shares of the capital stock of any corporation or any association, without any intention of one party to deliver and of the other to receive the shares, and contemplating merely the payment of the differences between the contract and market prices on divers days, shall be void, and neither party to any such contract shall be entitled to recover damages for failure to perform the same, or any money paid thereon in any court of this State." Option contracts are declared void¹. Clearing house settlements are not necessarily illegal². Bucketshop contracts are intended to be bets on fluctuations of the market by sham purchases of grain or stock ; they are gambling transactions and are illegal. In the *Central Stock and Grain Exchange v. Board of Trade of Chicago* [(1906) Ill. 396] the Court held that it had power to probe into the contract to find out its real nature. There are betting Acts based on English Acts and the object is to restrict betting advertisements.

Contracts
in Restraint
of trade.

In the *Taylor Iron and Steel Co. v. Nichols* [1908 24 L.R.A. (N.S.) 933] it was held that a man ought not to be assisted in restraining himself from the exercise of lawful business except, that in cases of the sale of good-will of business consideration, the performance of which is impossible, the promise is void. The duty to perform the promise is absolute and the promisor must perform his contract. In *Paradine v. Jane*

¹ *Revised Statutes of Illinois*, by Hurd, 1903, p. 640, s. 130.

² *Chicago Board of Trade v. Christie and S. Co.* (1905), 198, U. S. ,

(1660 Aloya 26), it was held that where the *law creates a duty* or charge and the party is disabled from performing it without any default in him, the law will excuse him. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he can notwithstanding any accident by inevitable necessity because he might have provided against it by his contract. In American law the rule is very strict and even if impossibility is the result of the act of God, the party will not be freed from the liability. There are certain exceptions in cases of impossibility, *e.g.*, where the public authority interferes and makes the performance of the contract impossible; such cases are dependent on construction only.

If a contractor threatens to break his contract unless he is promised an additional sum for completing the work, the question may arise if that promise is binding; It is not binding, because he has suffered no legal detriment; in the United States of America, it is held that he is entitled to the extra money. In England, it is held he cannot get it. In *Evans v. Orogan and Washington Railroad* (Wash. 1910, 28 L.R.A. (N. S.) 455,) it was decided that if that promise to pay was made openly and deliberately for the advantage of the contractor, action was allowed. But if the promise was the outcome of the necessity of the other party, and was the result of coercion, action would be improper¹. The best way to avoid this legal difficulty is to vary the terms of the contract slightly².

That there may be a contract for the same thing with another³ is none of the promisor's business. That is a matter purely between the parties to the contract. To inquire into the obligations of one of the parties to a stranger to the contract serves no purpose of justice,

¹*Shriner v. Craft* (Ala. N.R. Co. (1908, 131 Ky. 46). (1909) 28 L. R. A. (H. S.) 450 Note).
³*Wald's Pollock on Contracts*, 3rd ed., p. 310.

²*King v. Louisville and*

but is a mere mechanical application of the test of consideration as a rule of thumb¹.

Failure of
consideration.

By want of consideration is meant that there was no consideration from the beginning; while by failure of consideration is meant that it was good in the beginning, but became worthless afterwards by reason of some inherent defect in the thing given, *e.g.*, defect in title to the thing sold².

The effect of want or failure of consideration in simple contract, if it is complete, is to avoid the contract; if it is partial, the contract is avoided *pro tanto*. This is the rule both in England and the United States of America³.

In the absence of fraud of warranty the purchaser of real property takes the risk of the title being defective. In that case it is not failure of consideration; in the sale of personalty there is as a rule an implied warranty of title and failure of title will result in breach of warranty. The rule of Common Law is *caveat emptor* in the absence of fraud or warranty. This rule is accepted in the States of America⁴.

When the failure of title is complete, it can be set up in defence to an action on a note paid for the price of the real estate. The old rule was not to allow the purchaser to plead failure of title but to allow him to bring a cross-suit upon the covenant. In *Cook v. Mix* (11 Com. 433) action was brought upon a promissory note given as price of land sold; the defendant pleaded failure of consideration. Bissett J. said: "It is very obvious that when the party does not get what he contracted to receive and for which the note was given the consideration fails completely. On sale of personal property there is always an implied warranty

¹Harriman on Contracts 118.

²Century Dictionary.

³United States (63 Fed. Rep 536); Alabama (19 Ala 203); California (52 Cal. 661); Georgia (94 Ga. 280); Maine

(76 Me 135); New York (51 N. Y. Superior Court 342).

⁴Connecticut (1 Day Conn 156); Massachusetts (151 Mass. 275)

of title. But it turns out that the vendor has no title. Was it ever supposed that he could recover the purchase money and turn the vendee to sue on the warranty? And is there any well-founded distinction between the sale of real property with covenants and the sale of personal property with warranty? We suppose not. And we suppose it to be perfectly settled that where a total failure of consideration is shown, it is an answer to the action.

When the failure is partial, the purchaser may decline to accept the property or tender it to the seller and sue for damages for breach of the contract. When the consideration of a bill fails partially, and the amount can be determined, partial failure is good defence to the action. In English practice where the amount is unliquidated and failure is partial, the defendant can bring a cross action. In *Farnworth v. Garrar* (1 Comp. b 38) Lord Ellenborough said: "If the defendant has derived no benefit from the plaintiff's services he deserves nothing and there must be a verdict against him. There was a doubt on this point before. The late Mr. Justice Buller in cases of this kind held that cross action should be allowed. But I think the rule is not correct, the rule is that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, that shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence." In *Obbard v. Bentham* (M & N. 483), Lord Tenterden C. J. said if the party held bills given for the price of goods supplied, he could recover upon them, unless there had been a total failure of consideration. If the consideration partially failed, as by the inferiority of the article furnished to that ordered, the buyer should seek his remedy by a cross action. The warranty relied on in this case made no difference. Early American cases accepted the authority of English cases as binding, so that cross action was allowed. But now the rule in the United States is that if fraud was practised in bringing about the contract, or partial

failure of a title to land, or breach of warranty resulted, the party is at liberty to defend by urging in defence any of these pleas and it is no longer necessary to bring a cross action. In *Harrington v. Stratton* (22 Pick. Mass. 510) reasons for this new practice were given. It is always desirable to prevent cross action when full and complete justice can be done in a single action and the defendant can produce evidence in defence ; or to reduce damages. In *Wyckoff v. Runyan* (33 N. J. L. 107), Beasley C. J. said : " This rule of English practice has never given satisfaction to the bench or the bar. The rule savours of superfluous refinement rather than of practical wisdom." In *Boulmor v. Randles* (31 N. J. L. 341), it was decided that the old rule which had hitherto prevailed should be abandoned and that thereafter a partial failure of the consideration upon which a note was founded might be received in evidence in a suit between the original parties to it to the same extent as though such consideration had formed the basis of the action. By a statute of Vermont¹, it is enacted that partial failure of consideration can only be shown in defence when the action is between the original parties to the instrument itself².

Even specialties can be impeached for want or failure of consideration by statutes. But the statutes do not affect specialties originally intended to be voluntary. In *Allen v. Allen* (40 N. J. L. 446), payee sued the maker of a sealed note. It was contended that the sealed writing was without consideration and the contract void. Justice Scudder said : " If the defendant rebuts the presumption that no consideration was given in reality, the question is whether a sealed instrument without value being given for it can be valid at law. Here the parties have agreed that there shall be no consideration for the sealed document. It will not do to hold that every conveyance of land or chattels is void, by showing that no

¹*Revised Statutes*, 1906, ²*Burgess v. Nash* (66 vt. 44,) Sec. 911.

sufficient consideration passed when no creditors are affected. Nor can it be shown by authority that an executory contract entered into intentionally and deliberately and attested in solemn form by a seal cannot be enforced." If a party has deliberately and fully expressed his intention in writing, sealed and delivered, what should prevent its execution where there is no fraud or illegality? But two statutes of 1875 have been passed to protect persons from fraud and illegality in consideration; one allows fraud in the consideration of instruments under seal to be set up as a defence. The other takes away conclusive evidence of seal and makes it mere presumption. The Virginia Revised Code (1904, ch. 172, sec. 5) enacts that the words 'failure in consideration' refer to contracts originally founded on valuable consideration and not to contracts without consideration.

By English Common Law, a deed under seal raises conclusive presumption of consideration and the defendant is not allowed to show want or failure of consideration; in many of the States of America, a deed is not so regarded and it is open to the other side that no consideration was given. In India it is open to the obligor to impeach consideration on a speciality¹. In New York², the Code of Civil Procedure, sec. 840, enacts that a seal upon an executory instrument is only presumptive evidence of consideration, and that evidence can be given to rebut that presumption. The Tennessee Code (secs. 3213, 3214, 3215) abolishes the use of private seals. The West Virginia Code³ enacts that in any action on a contract, whether it be by deed or by parol, the defendant may file a plea alleging any such failure in consideration of such contract; and he can prove facts showing such failure in consideration in whole or in part. There are statutes on the point in different American States:—

¹Leonard v. Bates [1 Black 1909, (Ind.) 172].

²1906; Suppl. 1909, ch. 126,

³Consolidated Laws, 7 Vols. Sec. 5,

RULE VI.—A promise to compensate a person who has already voluntarily done something for the promisor is valid without fresh consideration being given at the time.

Lord Mansfield¹ said moral consideration was a valid ground to enforce promise, but in *Eastwood v. Kenyon* that dictum was over-ruled². The idea of existing legal liability as sufficient foundation to make an *express promise binding* was the origin of the action of *indebitatus assumpsit* on a debt and is still recognised³, e.g., Class I—Moral obligation to compensate for past service done constitutes a valid ground to imply a promise to pay; a promise to pay a time-barred debt⁴ a new promise to pay after discharge in insolvency or bankruptcy is good and binding⁵; a promise to pay debts incurred while an infant after attaining majority does not acquire consideration. II—Cases of moral obligation where there was no original legal or *quasi-contractual* liability.

A duty owing to relationship or morality which is not based on value cannot give rise to any legal liability. Writers are divided in opinion as to whether moral obligation can arise from receipt of benefit without original liability from contract, e.g., promise to re-pay another who has paid the debt without request or authority⁶. There is a consensus of opinion that if a debt is barred by statute or discharge in bankruptcy, any subsequent promise to pay will create liability to pay, even though it is based on moral grounds only but in cases in which there was no *legal* duty to pay but moral duty only, liability to pay cannot arise⁷.

¹*Lee v. Muggeridge* (1813),
5 Taunt 37.

²Note to *Wennall v. Adney*
(1840 11 Ad. and El. 438),
1802, 3 Bos. and p. 249,
(Finch S. Cases).

³*Beadle v. Whitlock* (1869),
64 Barb. 287.

⁴*McCormick v. Brown*, 102

Am. St. Rep. 751, note.

⁵*Mutual Reserve Fund v. Beatty* (1899), 93 Fed. 747.

⁶*Mass. Mutual Life Insurance Co. v. Green* (1904-70 N. I. 202.)

⁷*Fergusson v. Harris*, 1893
93 S. C. 323.

In U. S. A., a promise to pay for past benefits or services done without any solicitation, or under circumstances which might create liability at that time, is binding. In *Notes to Muir v. Kane* [1910, 26 L. R. A. (H. S.) 532], it was said 'moral obligation to support a promise must be an obligation of justice and honesty, based on value, piety or relationship, and must be co-extensive with the promise'. Consideration may be implied in fact or in law. There is no difference in the nature of an undertaking. There is actual undertaking in both cases. When it is implied in law, it is based on no evidence. It is a mystical creation of law. When it is implied in fact, inference is drawn from circumstances; in the one case intention is regarded; in the other intention is disregarded. There cannot be expressed and implied consideration relating to the same matter, *e.g.*, service may be rendered without intent to be paid for it; if the party afterwards changes his mind, and sues for the work done, he cannot recover. A service may be rendered without request; in that case in the absence of promise to pay, it cannot create any liability. But if it is done at his request without settling the amount to be paid, that remuneration can be recovered on a *quantum meruit*.

RULE VII.—Waiver, release or surrender of any legal right, as forbearance to sue even for a short time, is a valid consideration for the promise.

When the whole debt is due, a partial payment cannot be a satisfaction of the whole. This is the rule both in England and U. S. A. The consideration can be discharged in two ways:—(a) by accord executed; (b) accord executory. By accord executed is meant that when the parties mutually agree that the existing obligation shall be discharged by the acceptance of a certain satisfaction, the original contract comes to an end. The agreement must satisfy the mutual consent and consideration, otherwise it will fail for want of consideration and the original contract will revive. Accord executory is a bilateral agreement, the parties

agreeing to give and accept something else. The payment of a less sum at the same time and place where a greater liquidated sum was due cannot be a satisfaction for a larger amount even though it be accepted, because there is no valuable consideration for giving up the rest. This rule is accepted in England. The Commissioners of the Civil Code of New York (1865, p. 219) observe: "It is said this rule of Common Law is not founded on natural justice nor can it be supported on any other than technical grounds. An agreement to accept a barrel of flour in satisfaction of a debt of 1,000 dollars is valid and if the flour is delivered, the debt is satisfied. But an agreement to accept 999 dollars in satisfaction of the debt of 1,000 dollars is unavailing and the obligation to pay the dollars unimpaired." Pollock on *Contract* says: "Modern decisions have confined this absurdity to very narrow cases."

There must be acceptance of the accord in full satisfaction of the original claim. Acceptance implies an act of will. Hence for an accord and satisfaction to be legally binding, it is required that the money should be paid in order to satisfy that claim¹. To constitute forbearance binding in law: (a) there must be a *legal right* subsisting; (b) it must be enforceable against someone; and (c) there must be an agreement to forbear. If notice is given to a party to abstain from use of intoxicants, the party on abstaining can sue on it².

RULE VIII.—The compromise of a doubtful claim is regarded as sufficient consideration.

Mere assertion of a claim is not enough. There must be some doubtful point of law or fact.

Waht v. Barnum (1889, 116 N. Y. 87). Composition with creditors is an arrangement between a debtor and his creditors that the debt will be discharged, if the debtor will pay a part of the whole debt; and the creditors agree among themselves to relieve the debtor from

¹United States, 1 U. S., p. 497; United States (29 App. 7.

²*Wilby v. Elgee* (L.R. 10 Ch.

Fed. Rep. 175).

liability for the rest of the debt. Thus a composition is in its spirit an agreement between the creditors themselves as well as between them and the debtor. Stroud, in the *Judicial Dictionary*, defines composition with creditors as an arrangement between a debtor and his creditors whereby the latter agree with the debtor and mutually among themselves to receive, and the debtor agrees to pay an agreed proportion less than the full amount of 20 shillings in the pound in satisfaction of debts due. In *Bailey v. Boyd* (75 Ind. 127), it was decided that a composition with creditors is an agreement by a debtor in failing circumstances and a number of creditors to take a less sum at a time fixed instead of the original debt according to its term. The rule of Common Law that as between a debtor and a single creditor the acceptance of a less sum than is due in satisfaction of a liquidated debt will operate as a discharge *pro tanto* is regarded with no favour; it is necessary to show consideration, however slight, to maintain the transaction. The rule in *Foakes v. Boer* (L. R. 9, App. 605) is abrogated by statute; in *Jones v. Wilson* (104 N. Carolina 9), and in *Clayton v. Clark* (Niss. 1897 21 So. Rep. 565), the part payment of liquidated claim was held valid discharged; and the dictum in Pinnel's case was not followed. In *Steinman v. Magnus* (11 East 393) Lord Ellenborough said: "It is true that if a creditor simply agrees to accept less from his debtor than his just demand, that will not bind him; but if upon the faith of such an agreement a third person be lured in to become surety for any part of the debts on the ground that the party will be thereby discharged of the remainder of his debts and other creditors have been lured in by the agreement to relinquish their further demand upon the same supposition, that makes all the difference in the case and the agreement shall be binding." In *Evans v. Powis* (1 Exch. 607), it was decided that both creditors having a right to be paid in full, and each a chance of being paid more than the other if he pressed the debtor, each mutually agrees with the other to forego the right and be content with

less, and the engagement of one creditor to take a smaller sum is a consideration for the engagement of the other to do the same¹. Earle J. said: "Each creditor agrees to less part of his debt in consideration that others do the same; and each creditor may be considered to stipulate with others for a release from them to the defendant in consideration for a release by him." There must be good faith with creditors and the conditions of agreement must be carried out². The due performance of the terms of composition discharges the original debt; and if a new promise is made, it is without consideration. But if in making composition the debtor conveys property upon secret trust for himself but apparently for valuable consideration and induces other creditors to accept composition, it will be set aside on the ground of secret preference³. The creditor in such a case can sue to recover the full amount of the original debt after deducting what he had received under the composition, because the arrangement was in the nature of secret preference and is regarded as contrary to public policy.

Family settlements are examples of this class of consideration. The policy of law is to discourage litigation. There is mutual release of respective claims by the parties. The law of England and U. S. A. is quite similar⁴. The claim must be doubtful and the consideration on each side is the settlement of dispute and abandonment of the claim⁵. In *Maxwell v. Campbell* (8 Ohi. St. 265) Brinkerhoff J. said: "Fair and honourable compromise between parties, perhaps equally guilty, who are about to become the parents of an illegitimate child are not only dictated by sentiments of honour and duty, but are in entire harmony with the policy of our statutes."

¹In *Mallaben v. Hodgson*, 16 Q. B. 689.

²*United States* (27 Fed. Rep. 185); *New York* (14 N. Y. 322).

³*United States* (2 Dill. U. S. 108); *Indiana* (10 Ind. App. 665); *Massachusetts*

(8 Met. Mass. 227).

⁴*Stapilton v. Stapilton* (1 Atk. 2; W. and T. L. cases); *Illinois* (4 Illi. App. 203); *Watkins v. Watkins* (24 Ga. 402).

⁵*Callister v. Bishoffshein* (L. R. 5 Q.B. 449).

RULE IX.—A past consideration is generally regarded a valid ground for the promise.

A promise to pay for past service without any previous request express or implied, will create liability, and *Lampleigh v. Braithwaite* is good law in American States. *Muir v. Kane* [1910, 26 L. R. A. (N. S.) 532]. If a debt is barred, any subsequent promise to pay will be binding both in England and U. S. A. But if there was no legal duty to pay but only moral obligation, liability cannot arise; but if promise is given to pay for past benefits received, it will be binding, but in English law it is not so.

RULE X.—Mutual promises are consideration for each other.

A purely executory bargain is not binding on either side, unless there is something definite and certain on either side. Bilateral contract resting on mutual promises has given rise to much difference of opinion¹. When action of assumpsit was introduced, the only consideration recognised was executed consideration, a detriment already incurred. In the 17th century, it was held that mutual promises are consideration for each other. Prof. Williston says it is an elliptical sentence and means that mutual promises are a consideration for promised performance. The parties contemplate that performance on one side shall be the exchange or price of performance on the other². This rule is based on different grounds in U. S. A., while in England it is based on convenience only and there is no logical reason³. Where the consideration for the agreement consists of a mutual promise, the plaintiff in the breach of promise must prove mutual undertaking to marry⁴.

¹For the real ground of consideration see Wald's *Pollock on Contracts*, 3rd ed., p. 201, note 141, p. 324n. *Harriman on Contracts*, p. 682.

²*Pollock on Contracts*, p. 191.

³Bishop, *Marriage and Divorce*, Vol. I, p. 187.

⁴8 *Harv. L. R.* 27; Parsons *on Contracts*, 9th ed., L. 186;

RULE XI.—There is no instrument in the nature of a deed; there must be valuable consideration in every case.

In England a sealed instrument raises a conclusive presumption of consideration, while in U. S. A. conclusive presumption is denied and it is open to the party to show that consideration never in fact was given. This is done by express enactments.

It follows that to obtain specific performance of a contract, consideration must be given. Hence the peculiar rule of English law that a contract in restraint of trade, even under seal, must have consideration does not prevail.

**B.—THE DOCTRINE OF CONSIDERATION IN
THE LAW OF PROPERTY AND
CONVEYANCING.**

RULE I.—The presence or absence of valuable consideration changes the legal nature of the transaction.

Gift is a voluntary transfer of property by the owner of it to another without consideration for it or without any other consideration than love and affection or a nominal consideration or both ¹.

There must be: (a) Absolute transfer of property from the donor to the donee, to take effect at once and fully executed by delivery of the property to the donee who must accept it. The laws of U. S. A. and England agree on the definition. An agreement under seal to make a gift is good in Pennsylvania ²; but it is not valid in other States, because the court of equity will not aid

¹*Century Dictionary.*

²*Yard v. Patton* (127 Pa. St. 4).

a volunteer (11 L. J. Ch. 401). Nor can an imperfect gift be regarded as a declaration of trust. *Milroy v. Lord* (4 De. G. F. and J. 274) is good law in U.S.A. (b) Delivery is essential to complete gift ; in Louisiana it is enacted that delivery is not necessary¹. (c) Gift must be accepted. There must be assent of both parties. In English law, acceptance is presumed till the donee dissents.

Conveyances operating by virtue of Statute of Uses require a consideration to support them ; otherwise resulting trust will arise, *e.g.*, deeds of bargain and sale of covenants to stand seized. Equity refuses to enforce executory deeds.

Equity as a branch of the law was brought over by the colonists and has always existed side by side with the Common Law in the various States². In Louisiana, there is no distinction between law and equity, because Roman Civil Law obtains there.

Group I.—Some States follow the rules of the English Court of Equity and exercise all the powers and jurisdiction exercised in England by the Court of Equity, *e.g.*, Alabama, Delaware, Mississippi, New Jersey, and Tennessee. Present
Status of
Courts of
Chancery in
America.

Group II.—These two sides of law and equity are fused into one, but distinct rules still prevail, *e.g.*, Federal Courts administer both law and equity in United States Federal Court, Arkansas, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Vermont, and Virginia.

Group III.—Some States have abolished the distinction between law and equity by means of Codes and administer a common method, *e.g.*, Arizona, California, Indiana, Iowa, Missouri, Nebraska, Nevada, New York, Oregon, and Wisconsin.

¹Revised Civil Code, Art. 1550.

²*Wells v. Pierce* (27 H. H. 512).

RULE II.—Conveyance can be set aside by other persons on the ground of want of valuable consideration.

Conveyance can be impeached by the *creditors* :

(a) When the seller does not part with possession to the purchaser ; the sale is then presumed to be fraudulent.

(b) When there is intent to defraud creditors¹.

There has been legislation in different States and the Statutes of Elizabeth are more or less followed. Under these statutes it does not make any difference that property is sold for value. If it is a scheme to defraud creditors, it will be avoided by creditors. The test to be applied is whether the transfer was *actually* made with a fraudulent intent in order to hinder, delay or defraud creditors. Those that have obtained judgment can avoid the sale, if they can prove that they had their claim, when the transfer was made². The Civil Code of California (sec. 3439) enacts that "Every transfer of property or charge thereon made, every obligation incurred and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all the creditors of the debtor and their successors in interest and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." The word void is not used strictly. It means voidable. Conveyance is valid between the parties and against all other persons than those mentioned in the contract ; also a *bona fide* purchaser from the transferee will be protected ; the creditor must take some step to avoid it.

¹ 13 Eliz. C. 4.

² 2 Mechem on *Sales*, sec. 944.

When transfer is made for value and creditor wants to set aside the sale, the creditors must show fraud on the part of the *buyer* also¹.

The creditors, to obtain benefit under the statute, must have obtained judgment².

(c) Sales in bulks are void. There are special statutes prohibiting dealers in merchandise from selling all their goods at once without giving notice to the creditors, the object being to prevent frauds by merchants who may sell out their whole stock privately and leave the place without paying the creditors. There is no such special provision in English law to protect the interests of the creditors.

(d) 27 Eliz. c. 4.—Subsequent purchasers can set aside conveyances or grants of any *lands* made to defraud them. In U.S.A. it is held that a voluntary deed is valid against any subsequent purchaser who buys with notice.

The basis of commercial credit is the creditor's confidence in the debtor, that he will be able to meet the obligation. Law will not allow any fraud to be perpetrated on the part of the debtor, if he impairs his ability by giving away his property with intent to hinder his creditors. In *Fox v. Hills* (1 Connecticut 295), it was decided that a voluntary conveyance to defeat the claim of a third person for damages arising from a tort would be void at Common Law, but not according to Connecticut statute against fraudulent conveyance.

There is no method of authenticating contracts in the United States by registration or inscribing them in official records of a notary public or Court. There is nothing corresponding to the English Bills of Sale Act in U.S.A. There is registry of title or of assurances.

¹2 Mechem on *Sales*, sec. 953.

²Wait on *Fraudulent Conveyances*, sec. 73.

An Act to establish a uniform system of Bankruptcy throughout the United States was passed¹, and is declared in force in all the States. The California Civil Code (sec.442), enacts that any transfer or incumbrance of property made or given voluntarily or without a valuable consideration by a party while insolvent or in contemplation of insolvency shall be fraudulent and void as regards existing creditors.

C.—OBLIGATION TO SET OUT THE NATURE OF CONSIDERATION.

There are some cases in which the law requires that consideration should be disclosed ; there are some contracts which must be reduced to writing. *Wain v. Walters*, 5 East 10, decided that agreement included promise and consideration both, and consideration must be in writing.

(a) The Statutes of Frauds are re-enacted in U.S.A. in substantial form.

(b) There are some States which enact that promise to pay a time-barred debt should be in writing. At Common Law consideration being required in simple contracts, was not to be set out in writing if that contract was not required to be in writing². There is a difference in statutes about consideration being also mentioned in the written contract; some States insist on both promise and consideration being in writing. Even if receipt of consideration in contract is acknowledged, evidence may be given to show its absence. Contracts of guarantee need not set out consideration³.

(c) There are other special enactments which require consideration to be set out, *e.g.* Corporation Acts.

¹30 Statutes at Large, 544.

²*Browne on Statute of Frauds*, sec. 391.

³Mercantile Amendment

Act. 18 & 20 Vict c. 97 is followed.

- (d) Transfer of ships, and charges on them.
- (e) In deeds of conveyance if consideration is not stated, it may raise presumption of resulting trust unless consideration be proved¹. In *Gully v. Grubbs*, 1 J.J. Marsh Ky. 387, the rule in U.S.A. was laid down by Robertson J. "An acknowledgment in a deed of receipt of consideration is only *prima facie* evidence of payment."

¹ Elphinstone on *Deeds*, p. 151.

CHAPTER VII.

THE DOCTRINE OF CONSIDERATION IN ENGLISH LAW COMPARED WITH THAT IN ROMAN LAW.

Before the time of Severus Rome had no law of contract. In the patriarchal family there was no need for an elaborate system of contract. Barter was the earliest form of dealing; and the transaction was complete when the commodities were exchanged. Where a person promised to give or do something in the future, the moral sanction was very powerful. Surety was taken to ensure performance of the promise¹. All private dealings were governed in early Roman law by *mancipatio* and *nexum*. *Mancipatio* was a general sale. No *mancipatio* could legally operate unless the price was actually paid or security given for it. *Mancipatio* was a sale for ready money and was used for economic purposes. To make a valid alienation binding in law, it had to be for some value and carried out before five witnesses and *libripens*. If more things were to be mancipated than the alienee could take hold of at once, the ceremony of *mancipatio* had to be repeated each time. *Nexum* was a solemn loan *per aes et libram*. Before five witnesses the *libripens* weighed out to the borrower a certain amount of raw metal and the lender at the same time declared the borrower to be his debtor of that amount. The debtor became *nexus* to the borrower, pledging his person for the loan².

By the time of the Twelve Tables the period of barter had passed, and loans and sales *negotia per aes et libram* occupied a prominent place. Coined money was

¹ Muirhead, *Roman Law*,
2nd ed., by E. Goudy. p. 271.

² Sohm's *Institutes of Roman
Law*, by Leddie. p. 115.

introduced, and the economic condition of Rome rested on money. Land had become mancipable. The law of the XII Tables was a law for agriculturists; it was very rigid. Commerce made strides and the question was how to keep pace with progress. The XII Tables were in force more than a thousand years. But though the form was retained, the spirit was changed by means of interpretation. Munro¹ says: Whenever a contract or conveyance is made, as it is specified by word of mouth, so let it be binding. M. Voight says²: The legislation of the XII Tables produced two results: (1) It increased the importance of the *verbal part* of the ceremony, and contract tended to be flexible and in turn the contract became a symbolic affair only. As money was used, it was not weighed out, but named in the *nuncupatio*, while the borrower struck the scale with copper. (2) The debtor was not very severely treated³.

Justinian defines Obligation to be a legal bond, that is the being compelled to some performance by the law of the State⁴. Obligations are divided into Primary and Secondary. In obligation, *ex contractu* the *necessitas* of the Primary and Secondary obligation consists of a *necessitas solvendi*. The objects of obligation were classified into *dare*, *facere*, and *praestare* in Roman Law. Gaius (IV. 2) says: A personal action seeks to enforce an obligation imposed on the defendant by his contract or delict. When one person is obliged to convey ownership in a certain thing to another, according to the requirement of Roman Civil Law, the obligation is *dare*. When compensation is given for a wrong it is called *praestare*. Another obligation arising *ex contractu* consists in *facere*. The above division is based on the peculiar rules of pleading which prevailed during the formulary system. The act or forbearance must be of money value because during the formulary procedure

¹ On the XII Tables, p. 54.

Roman Law, p. 17.

² Die. XII Tables.

⁴ Just. Inst. 3, 13.

³ Buckler, Contract in

damage in money was given in personal actions ; specific performance was unknown. Primary obligation is divided into: (1) Civil and (2) Natural Civil obligation is one which can be enforced by means of an action according to the *jus civile*, while Natural obligation is not enforceable by means of any action ; but may be used by way of an exception. Natural obligation is very much like an imperfect obligation in English law, such as statute-barred debts.

Civil obligation may arise either by contract or tort. The word contract is an agreement which can be enforced by law. The essence of contract consists in the intention signified by the promisor and an expectation raised by that promise of something in the mind of the promisee to be performed. Hence there is a ' chiming together of this intention with the expectation.' The sources of obligations according to Modestinus are *res, verba, consensus lex, jus honorarium necessitas peccatum*¹. There are besides these other agreements recognised by jurists and praetors and known as *pacta vestita*. The above classification is based on the historical development. In every contract there must be *conventio* or *pactio*². Ulpianus says (on Edict 4) : The justice of this part of the Edict is founded on nature. What can be so agreeable to nature among men as that they should keep their promises ? *Pactum* is derived from *pactio* ; (2) *pactio* means consent, agreement, of two or more persons to the same effect ; (3) *conventio* is a general term meaning coming together (*convenire*). Certain pacts were called *pacta vestita* because action could be based on them. They were either civil, praetorian or based on imperial law. (a) According to classical Civil law *pacta adjecta* were actionable. They were collateral agreements added there and then to a *bona fide negotium* at the moment when the latter was entered into, e.g., if the parties to a contract of sale agreed that in default of payment at a fixed date the defaulting party would pay a penalty fixed ; and in case of default that

¹ *Digest*, 44, 7 52.

² *Digest* 11, 14, 1, 2, Munro.

penalty was enforceable even though there was no stipulation to enforce it. (b) By Praetorian law *constitutum debite* was allowed to discharge a subsisting liability whether one's own or another's. (c) Promises to give in future were made actionable in the shape of informal pacts (*pacta legitima*) by Imperial constitution. The agreement is the basis of the contract. It can be analysed into offer and acceptance. *Pactio* is a wider term than contract. *Pactio* did not give rise to an action without the presence of some additional matter besides the mere fact of agreement. That something was called *causa*. It is wider than consideration executed in English law, but it has no general resemblance to it. It is a mark in particular cases to distinguish between classes. In older Roman law, owing to a peculiarity, some pacts were given a binding force in law. That which makes a pact a contract is called *Causa Civilis*. They are four (a) *res*, delivery of ownership, possession or custody, or detention of a thing by a creditor. They are real contracts. (b) The agreement must be expressed in a definite verbal form. Stipulation is an example of this class. (c) Writing was required in some contracts. They were called literal contracts. (d) The mere *consensus* or agreement of the parties was the *causa civilis*; sale, hire, partnership and mandate are instances of consensual contracts.

Contracts may be divided into formal and formless; formal contracts are *nexum*, stipulation and *litteris*; formless contracts consist of real and consensual contracts. Formal contracts are actionable, because a symbolic form prescribed by *jus civile* is observed; the ceremony is intended to rouse serious thought in the minds of the contracting parties and is a guarantee against imposition and haste. In real contracts the law secures the guarantee of seriousness by the fact that one contracting party gives over his property or possession to the other. If a convention was made in which neither form nor parting with property was involved, it was named *nudum pactum*. It was

ineffectual to produce a civil obligation, but was used by way of defence when an action was brought¹.

Stipulation was the only formal contract which was known in the time of Justinian. It was a contract by question and answer; the question was asked by the creditor and the debtor answered it. The origin of stipulation is supposed to be religious. The term is derived by the Jurist Paulus from *stipulum*, meaning firm and coming from *stips*, the trunk of a tree. Festus derives *stipulatio* from *stips*, coined money. Isodorus derives it from *stipula*, a straw; while Ihering thinks that it is derived from the Sanskrit *otha* meaning staff. *Sponsio* was used as a general form of contract adapted to every conceivable kind of transaction; it was used in the law of procedure, and frequently to create a contract of suretyship. A question was put by the promisee and it was answered by the promisor. The word *spondere* was used by both parties and it was a contract *juris civilis*; it was to be expressed in the present tense. *Sponsio* was employed as a means of decision by wager in which the contention of either party was put before the judge; it was also a means of fixing penalty, and of obtaining decision in *condictio certae* or in interdicts and also a mode of forming contract of suretyship. Voigt gives an account of *sponsio* and *stipulatio*. There were various forms². Gradually the question and answer were not required in Latin,³ and the exact correspondence between the question and the answer was not insisted on. By means of stipulation at a later stage aliens were able to contract; parties that were not in one place were able to do so, and the ceremony was relaxed and remedies were devised by law under the influence of praetors by treating the stipulation as written evidence of the contract having taken place. Hunter⁴ says: "Stipulation was not confined to particular transactions, such as buying,

¹ *Digest* 2, 14, 17, 4.

³ *Gaius* 3, 9, 3, 1-3.

² *Gaius* III. 92; Justinian
Inst. III, 15 pr.

⁴ *Roman Law*, 4th ed, 463.

selling, but was co-extensive with the subject-matter of contract. It was not so much a contract as a universal form by which any promise could be made binding in law." Bekker says *actio per sacramentum* was granted to enforce stipulations. *Condictio* was introduced by *lex Silia*. (Hunter gives date, 244 B.C., Ihering 350-300 B.C.; Voigt 423-425 B.C.) Gaius¹ says it was called *condictio*, because by means of it the defendant was informed that he might appear within thirty days to select a *iudex*. *Lex Silia* allowed this action of *condictio*, when a definite sum of money was claimed, while *lex Calpurnia* allowed *condictio* when any definite thing or quantity was required. In the time of Gaius, the action of *condictio* became superfluous, because by means of *sacramentum* or *per iudicis postulationem* anything that ought to be given could be recovered. Gaius² says that at this period the *sacramentum* was confined to real actions before the centumviral court. *Condictio* was used to recover certain sums or things upon a unilateral contract, while *iudicis postulatio* was allowed to recover uncertain sums due on bilateral contracts. The action involved wager of money and one-third of the amount in dispute was given to the party that won the case; in *sacramentum* the wager went to the state. The influence of the praetor in developing the new *causae* was very great. The praetor exercised judicial and legislative functions because the control of actions was given to him. He could grant or withhold an action. He could devise new forms of action. This is clearly seen from the formulary system. In *legis actio* the legislators and litigants appear. The praetor had complete power over actions. He had great discretion in granting new actions. He acted more like a legislator than as a judge³. All *legis actiones* became by degrees odious; and by their excessive refinement a suit was often lost for the most trifling and technical mistake. During the formulary system the praetor would issue a formula

¹ *Inst.* III. 4 Sec. 18.

³ Gaius IV. 138—170.

² IV, 20 *Poste*.

to a *judex* and would order him to determine issues of fact and this led to written pleadings being used in courts. The *lex Aebutia* 170 B.C. legalised this mode of procedure. The formula consisted of *demonstratio*, *intentio*, *adjudicatio* and *condemnatio*. The *judex* occupied a subordinate position. Great changes could be effected by the praetor in framing the formulae. This was done by introducing changes in *condemnatio*. The development in the matter of obligation was facilitated by the praetor. The well-known formula was, 'Whatever in respect thereof the defendant ought to give to or do for the plaintiff in that I order you to condemn him'. *Exceptiones* were the most powerful method of mitigating the harshness of the law. Under the old law *stipulatio* was binding even if fraud was practised. The praetor intervened by inserting in the formula a statement, that if the *exceptio* were proved, the finding should not take effect; such *exceptiones* as fraud and compromise were good in praetorian law, but bad in civil law. *Exceptio doli* was very important because the praetor developed the law. It included cases of fraud and of bad faith. Hence cases of contracts under duress and suits brought after release could be set right and the praetor gave relief. It covered counter-claim, set-off and looked to the true essence of the transaction and not the mere expression of promises. Sohm¹ says it was through the flexibility of this mode of procedure that *exceptio doli* was used in the theory and practice of Roman law to effect changes in the material law as equity required. *Actiones arbitrariae* mitigated the rigour of the law. In the procedure by *actiones arbitrariae*, the *judex* was empowered to restore the property to its owner. If the defendant refused to give that thing, the plaintiff would state on oath the value of it and the *judex* would give a larger sum, the object being to compel restitution. Sohm² deals with formulary procedure. Interdict is

¹ *Institutes of Roman Law*,
315.

² *Institutes of Roman Law*,
secs. 36—43.

compared with injunction of English law, but it was a procedure adopted to summon the parties before the praetor to obtain a rule to be followed in determining the public rights. Gradually it was used to determine private rights also. The praetor announced at the commencement of his tenure of office the changes he wished to effect and in this way he would create new rights. *Lex Cornelia*, 67 B.C., enacted that the praetor must be bound by his own Edict. It lasted for the whole time the praetor was in office, generally a year. The legislation by Edicts was peculiar to Roman law and was a potent factor in shaping the general law of contract, as new *causae* were introduced giving right of defence. Leage¹ says it has been thought that the formality of a stipulation was derived from the ancient promise by oath, *jus jurandum*. *X* engages to give or do something for *Y* and at the same time makes libation to the gods and calls down their vengeance, if he breaks his engagement. The obligation was enforced at first by means of religious sanction—or the moral force of the society and later by legal sanction; the oath is then disused and the promisee puts by way of question to the promisor what was originally contained in his oath. Muirhead² says stipulation exercised great influence on the law of contract, because unilateral obligation sprang through it; gradually it was adapted to every kind of contract. By using certain words in the form of question and answer, any lawful agreement could be made binding, and action could be brought to enforce it. This process was similar to the use of action on the case in English law; the Roman formulary system resembles the procedure of early English law; and like action on the case gave great flexibility to the growth of law of contract. *Expensilatio* was making an entry in an account book which gave rise to liability for obligation. These entries were made in a *codex*. Some writers are of opinion that these book-debts were entered by the creditor in the main *codex*. Voigt writes that such entries

¹*Roman Private Law*, p. 71.

²*Roman Law*, p. 213.

were made in a special *codex*. Literal contract, writes Muirhead¹, was made by an entry by the creditor on a separate folio of the chief household ledger. Voigt has given a form of such entry. The old theory given by Savigny and Maine is that *expensilatio* was a sufficient form of *nexum*. They point to the word *expensum* as indicating the fiction of a money loan made by weight, but they fail to explain how a nexal loan could produce a contract totally different from itself². This theory explains *expensilatio* as a device first used by bankers and merchants and gradually by the people. The commercial origin of *expensilatio* must be carefully marked. It shows how trade had to do with moulding the law of contract and *causa*. This institution of *expensilatio* originated with the bankers of southern Italy. It seems to have been introduced by the Greek *Argentarii* who visited Rome, and this account points to the belief that at the time *expensilatio* was recognised, a high standard of good faith and honesty prevailed among the people. Stipulation has died out, writes Savigny³, because every system of law must possess some formality of a stricter sort, which produces *actio* apart from the particular tenor of the transaction. The Romans had *stipulatio*; it was quite peculiar to the Romans; Germany tried to assimilate a new form to *stipulatio*. And it is wrong to say that stipulation gradually decayed in the system of law; Canon law did not renounce it. When the form of stipulation disappeared, there were two drawbacks: (a) there was no clear and exact evidence of contracts having been made; (b) and the parties did not give serious thought before entering into contracts. Some special form was invested by insisting on writing, whether as evidence merely, or as a necessary condition to a binding contract between them. Hence in modern times writing for contract is insisted on in certain cases.

¹ *Roman Law*. Muirhead 119

² Voigt I. Note 11, 244 ff.

³ Savigny, *Obligations*, Vol.

II, p. 231; Buckler *Contract in Roman Law*, p. 130.

In real contracts the *causa* consists in *delivering* money or goods, e.g., *mutui datio*, *commodatum*, *depositum*, *pignus*.

In *mutuum* (a) one party promises to pay a sum which the promisor has received from the promisee; (b) and there is alienation to a person who promises to reconvey its equivalent to the alienor.

In *depositum* and *commodatum* there are two factors: (a) a party promises to restore a thing received from the promisee; and (b) there is delivery by depositor or lender of the thing detained which is promised to be given back.

In *pignus* there are two factors: (i) delivery, and (ii) promise to redeliver possession. To this class the name of innominate contracts was given and later on its scope was extended¹.

In consensual contracts the *causa* consisted in the nature of the transaction itself, e.g., sale, hire, *societas*, mandate². Contract of sale was complete as soon as the price was agreed upon and before earnest money or price was paid. Earnest money was mere evidence of the completion of the contract. The price must be definite, it must be money. In letting and leasing the same rules obtained³. The locator agreed to give to another (conductor) the use of something or to perform some work for him in return for a definite sum of money. In *societas* a promise is given by a partner to contribute towards the attainment of a common end; and the other partner promises a like contribution towards that end.

In mandate a promise is given to perform something at the expense of the principal; and the other party gives authority to deal with property of the grantor to one who promises to carry out faithfully the instructions of that principal.

¹ *Digest*, 19, 5.

³ *Digest* 19, 2, 1.

² *Muirhead*, 3, 2, 16.

To these privileged contracts were added subsidiary contracts, entered into at the same time. They were known as *pacta addicta*. Justinian added *pactum donatio*. The peculiarity of real and consensual contracts is that each contract contains two factors, each making an efficient cause of the other. Each is a lever by which the will of the other is moved.

In Roman law *nudum pactum* does not mean an agreement made without consideration, because of the peculiarity of doctrine of *causa*. Besides a promise Roman law insisted upon a further element which must be sufficient to be regarded as suitable *causae* or occasion in order to create a contract. The doctrine of *causa* which was at first confined to the few privileged contracts was gradually expanded; the praetor's reluctance to give such new obligations the name of contracts was great. They were known as *pacta*, not *actionibus vestita* and were *nude*. They were enforced indirectly by raising a defence, but no action could be based on a pact. Salkowski¹ says the system of Civil Contracts was gradually expanded by means of innominate contracts. The civil obligatory agreements were extended to making all formal agreements (*nova negotia*) actionable in consideration of counter-performance even though that agreement did not come within the privileged contracts then known.

The three elements of contract are: (a) proposal, (b) acceptance, (c) an additional requirement, if any, to support an action; in English law that requirement is named valuable consideration; in Roman law it is called *causa*. The enforceable agreements in Roman law are called: (a) contracts, or (b) *pacta praetoria*, or (c) *pacta legitima*. If there was an agreement but no *causa*, *pactum* was unenforceable by action. A *pactum* might produce *naturalis obligatio* and was used by way of defence to an action to recover money; if a *pactum* were added to (*pactum adjectum*) an

¹ *Roman Private Law*, pp. 504f, sec. 626.

obligation which was *negotium bonae fidei* at the time. it became a binding contract. If it were added afterwards, it gave rise to *exceptio* merely¹. Moyle says if an agreement was not of the recognised class or expressed in proper form it was *nuda pactum*, and no action could be based on it². If there is no additional ground for *causa* in that case, it is certain that no obligation can be created on the mere agreement and *nuda pactum* does not produce obligation but only an *exceptio*. Praetor acted on principles of equity and disregarded strict rules of civil law³.

Hunter⁴ arranges the law of contract under three classes: (1) Formal contracts, (a) *nexum*, (b) *stipulatio*, (c) *expensilatio* or *nomina transcripta*; (2) contracts for valuable consideration, (a) *emptio venditio*, (b) *locatio conductio*, (c) *Societas*; and (3) real contracts, *mutuum*, *depositum*, *pignus*, *hypotheca*.

Sohm⁵ says Roman law all along adhered to the principle that not every promise which can be intended to create an obligation is legally valid and actionable. In Roman law some definite ground recognised by law must be present in addition to the promise. A contract in Roman law is not any declaration of consensus, which is intended to create an obligation, but only a declaration of consensus which results in an obligation actionable by civil law.

In Roman law the word *causa* is used in various senses. Various meanings of *causa*.

In earlier Roman law *causa* denoted that characteristic which made the contract actionable, namely, the formality in one class of contracts, mutual consent in another, the presentation in real and innominate contracts⁶.

¹Sohm *Institutes of Roman Law*, sec. 84, pp. 429-430.

²*Digest*, 2, 14, 7, 4

³*Digest*, IV Tit. V. 2, 2.

⁴*Roman Law*, p. 458.

⁵*Institutes of Roman Law*.

⁶*Digest* 44, 7; Mackeldei, *Systema juris Romani*, lit. 2, sec. 364.

Causa, says Pollock, is simply a mark, whatever that might be in the particular case, which distinguishes any particular class of agreements from the common herd of *pacta* and makes them actionable¹.

Even in Roman law, *causa* denoted a ground or reason for the undertaking being embodied in a contract. Ulpian² states that a *stipulatio sine causa* gives no ground of action and if action be brought on that claim, *exceptio doli* can be used to defeat it. By cause he means not the formality of *stipulatio*, but the reason or ground for entering into that formality. If that ground is not a recognised one, then in spite of its formality, the *stipulatio* cannot give rise to an action. In this sense the word *causa* was freely used by Dutch jurists.

Definition
of *causa*.

Causa means cause, case, grounds. Ulpian says that inquiry under *causa cognita* was directed to the motive. It is distinct from consideration³.

Classification
of *causa*.

Causa is divided into *justa* and *injusta*. Acquisition in *usucapio* to ripen into ownership requires *bona fides* and *justus titulus*.

Injusta causa means illegal consideration. No contract can be enforced if it were made for an illegal *causa*, in which the inducement as distinguished from promise was illegal⁴. The defence is fraud or illegality.

A *lucrativa causa* is a gain made knowingly which ought not to be made. To acquire a thing *lucrativa causa* is to obtain it without any valuable consideration; e.g., a thing cannot be acquired twice by *lucrativa causa*.

In *usucapio* possession by mistake or on some untenable ground, e.g., error (*falsae causae*) does not give rise to *usucapio*.

If a legacy is given under *falsa causa*, it will not be had, because *causa* means motive assigned by a testator for his liberality.

¹ *Law of Contract*, p. 744.

² *Digest* 44, 4, 2, 3.

³ Roby, *Introduction* to

Justinian, p. 129.

⁴ *Code* 4, 7, 5; *Code* 4, 7, 1.

Causa seems to include the object and the ground of that object; while consideration is quite distinct from motive¹.

Pictatis causa is an instance to show that if a woman erroneously believes herself to give a *dos* and settles some property, she cannot recover the money settled, even though it was in error.

Condictio sine causa arises when an agreement is made without any good ground, real or supposed.

Condictio ob rem dati re non secuta is an action for recovering what has been given for a promise which has failed.

Causa may be fraudulent, usurious.

There is no distinction between good and valuable *causa* in Roman Law as in good and valuable consideration.

Causa may be concurrent, continuing, executed or executory.

Among *causae* may be mentioned *venditio*, *dos*, *donatio*, *solutio*, payment, *mutuum*, *permutatio*, and exchange. Though *causa* generally exists at the time of delivery, it may arise subsequently.

The result of *traditio* by itself was detention, as in deposit or civil possession (in *pignus*): the *causa* converted detention into *dominium*; if there was a sufficient cause, a mistake of the parties as to the real nature of the transaction would prevent the property from passing, *e.g.*, if a property passes under a mistake one thinking that it is payment of debt, while the other thinks it is a gift. This is neither a gift nor a payment². In *possessio*, *causa* consisted in *addictio*, meaning making over the property to an individual in the name of the people. In *jure cessio*, *causa* consisted in a voluntary transfer under a magistrate's authority,

¹Thomas v. Thomas, 1842, Digest 41, 1, 36.
2 Q. B. 851.

e.g., fines and recoveries. In *adjudicatio* cause was the sentence of a judge. The *causa* in contracts has been already mentioned. *Causa civilis* were four: (1) *Re*: acceptance of ownership, possession, detention of an object by one party from the other with implied or express promise to return the thing as in four real contracts. (2) The expression of agreement in a certain verbal form, *e.g.*, stipulation. (3) Writing peculiar to the Roman system of book-keeping *litteris*. (4) In sale, hire, partnership, agency, the mere agreement (consensus) of the parties was the cause. Giraud¹ says the debtor was obliged by reason of performing a solemnity; in the verbal contract by reason of the set response to the interrogation of the other party. Without this he was not bound. The formula by degrees was subordinated to real contract. Maine's *Ancient Law*, ch. IX, deals with the history of contract.

Causa, according to Liebe, must be *donare*, *solvere* or *credere*; Ulpian² says that the existence of *causa* is the ground of an actionable obligation; while its absence causes hindrance to obligation to arise.

A.—RULES OF THE DOCTRINE OF CAUSA IN LAW OF CONTRACT.

RULE I.—*Causa civilis* is necessary to make a valid contract.

Agreement resulting in obligation enforceable by law is a contract. This is true of English and Roman contract. In both something more than agreement of the parties is required to produce actionable liability; there must be some *causa* or legal reason why the law should enforce it; otherwise it is ineffective. In English Law this cause or legal reason is either an agreement under seal or presence of consideration. In Roman Law the main *causae* were four, by reason of which an agreement was capable of producing an action-

¹ *Manuel Elementaire de Droit Roman*, pp. 444-447.

² *Digest*, 2, 147, secs. 2, 4.

able liability. These *causæ* are *re*, *verbis*, *litteris* and *consensus*. Savigny defines a contract as an agreement of several persons who by a common act of the will determine their legal relations. He divides contract into six classes :—

(1) *Legitimæ* contracts which owe their origin to *jus civile*, and *jus gentium* contracts which owe their origin to *jus gentium*. This division is based on their historical origin.

(2) Contracts divided into (a) unilateral and (b) bilateral.

(3) Contracts divided into those in which one party only is to derive benefit from the promise, or where both parties will derive benefit from it. These were enforced according to civil action.

(4) Contracts divided into *stricti juris* or *bonæfidei* in which prætorian action was granted.

(5) Contracts divided according to the presence or absence of a solemn formality being required by law.

(6) Contracts divided according as civil law gave a right to bring action or allowed the plea of *exceptio* to be urged by way of defence only.

Innominate contracts in Roman Law can be compared with simple contracts because in both cases efficiency does not depend upon any form of English Law ; verbal and literal contracts resemble English contract under seal, because both have derived efficacy from form only.

RULE II.—Causa may consist in donare, solvere, or credere.

In Roman civil law the observance of form was essential in verbal and literal contracts : and the form was a guarantee of the genuineness of consent ; while in informal contracts of *re* and consensual there was a guarantee of genuineness from the fact of possession or dominion being given over to the other on the undertaking to return it or its equivalent, while in consensual

contract the fact of the consent being given was regarded as enough to constitute the binding contract. The question of benefit or detriment does not arise in considering the binding force as it does arise in the English Doctrine of Consideration. The English generalisation of Consideration is wider and more profound than the particular *causæ* which must be present in every species of contract. In fact, the Roman *Causæ* were at first four in contract, but later on the prætors began to extend their scope by means of the formulary system

The *solutio* of which the Law imposes a necessity when it creates obligation can be analysed into *datio*, *factio*, *præstatio*. By *datio quiritarium*, ownership in a definite object or sum of money can be transferred; by *factio*, any service other than the transfer of quiritary ownership in a certain thing can be given; while *præstatio* was used to discharge obligation engendered by *maleficium* (Gaius Poste).

RULE III.—The general rule of Roman Law is that none but the parties to the promise can enforce a contract.

No third person can be made liable or derive benefit from the act of a person who is not a party to the contract¹.

This rule is applicable to solemn and non-solemn classes of contracts, to *exceptiones* and to actions.

If a contract is made on behalf of self and a third person, the rule is that (a) if it is in a solemn form, only the half is good²; (b) if it is in a non-solemn form, the whole is good.

There are two cases in which the contracting party and not a third person can acquire a right: (1) when the mere discharge of the obligation is made to the third person; or (2) when the discharge, although it

¹Code 5, 12, 26, *Just. Inst.* non-potest Dig. 44, 7, 11.
III, 19, 19 *Alteri stipulari* ²*Just.* 3, 19, 4.

be made to the third person, is for the advantage of the contracting party owing to the third person being the son or slave, or cashier or creditor, of the contracting party.

There are cases in which a third person and not the contracting party can acquire a right :—

- (1) A son or slave acquires for his father or master.
- (2) Stipulation is made for heir presumptive.
- (3) The contracting parties have reserved a right of restitution to a third person.

Under the *old law*, children in *potestas* and slaves could acquire benefits for their paterfamilias without their will ; but they could not incur debts without the will of their owner ; a stranger could not acquire rights or incur liabilities on behalf of a third person.

Under *later law* prætors granted *actio exercitoria*. It was granted whether the actor was manager for the owner or not. This action was at first allowed between the ostensible parties only ; and gradually the right to sue a third person was given¹. This was called *actiones adjectitæ qualitatis* ; *actio institoria* allowed delegation to ostensible parties. Here real parties to the contract can sue and be sued ; *actio de peculio* allowed a child or slave in *potestas* to be sued for a limited liability to the extent of *peculium*. *Actio tributaria* was very similar to *actio de peculio*, but the father was not allowed to deduct the *peculium* ; *actio quod jussu* originally did not allow the father to acquire debts through his child or slave ; but by means of *actio de in rem verso*, the father could acquire debts through his children or slaves.

In the time of *Justinian*, the creditor had got two debtors, but in the *old law* the creditor had one debtor who really managed the business or ship. The prætor had the discretion of giving or refusing existing

¹ *Digest*, 14, 1, 5, s. 1.

actions. If the action was brought against a tutor, the prætor would allow it against the pupil himself to save the tutor from bad repute; when an action was brought by an attorney, if he acted as a cognitor, the principal was directly liable¹.

In Roman Law a contract cannot be made with an indeterminate person, *e.g.*, in case of the advertisement of some reward to a person finding lost property, the finder cannot claim the reward by action. In English Law the finder can sue. In public auctions as soon as the hammer falls, there is a determinate person, and action can be brought for the price. This is English Law also. In bills or notes to bearer, the principle is the same. In Roman Law the negotiability of notes was not recognised; and the idea of *causa* in bills of exchange has no place in Roman Law, because the theory of real actions was not applied to notes and bills; in *actio vindicatio* the plaintiff was required to show an absolute right to the property; and in *actio publiciana*, the plaintiff must prove quasi-property.

The Roman Law tried to get over the difficulty by adopting a device. Moyle² says if a promise were given by *A* that *B* should do or forbear from doing a certain thing, as a general rule neither *A* nor *B* would be bound by the promise; but liability can arise in the following cases:—

(a) *A* can be liable: (1) if his promise is secured by a penalty³; (2) if he promises expressly or impliedly to get *B* to do or forbear from doing that thing.

(b) *B* can be liable: (1) if *A* is his messenger; in particular instances actions were made by prætors; or (2) if he is *A*'s heir.

Liability may be created in favour of a person who was not a party to the contract.

¹Savigny *Obligations*, p. 120.

³*Dig.* 45, 1, 38, 2; *Just.* III,

²*Justinian.* (1893) p. 73. XIX, s. 19.

(a) If *X* promises *Y* to do something for *Z*, according to the general rule there can be no rights created in favour of *Y* or *Z*; *Y* cannot have any right, because he has no interest; *Z* cannot have a right because he was not a party to that promise; but *Y* can acquire a right under the promise.

(1) If he can show that if *X* performed the promise to *Z* he would derive some benefit from the performance or that *X* not performing his promise he will be exposed to some liability¹.

(2) If any penalty is imposed in default of the performance, it becomes a promise made for him².

(b) If the transaction consists in giving something to *Y* in the name of *Z*, *Z* can use in *condictio in person*³.

(c) Where *Y* makes a gift to *X* on condition that he transfers it to *Z*⁴.

(d) If *Y* deposits or lends property to *X* on condition that he returns it to *Z*.

(e) Stipulation on behalf of a third person must be secured by a penalty, otherwise it is void⁵.

If a promise of performance is made to either of two persons, it is said to be *solutionis cause adjectus*; the promisor can release himself by performing the promise to either of them. But if the promise of performance is made to two persons, one of them can acquire no right whatever, if the performance is made to the other. There was a difference of opinion among jurists. The Sabinians held that one of the two parties could acquire the whole of what had been promised. Justinian did not follow this view. Poste says the view of the Sabinian school was accepted in formless contracts⁶. Moyle suggests that the rule should prevail in bilateral obligations⁷. Labio says a convention may be made:

¹ *Inst.* III, XIX, 20.

² *Inst.* III, 19.

³ *Dig.* 12, 1, 2, 4.

⁴ *Code*, 8, 53, 3.

⁵ *Just.* III, 19, 9. (1883) p. 73.

⁶ *Dig.* 18, 1, 64.

⁷ *Dig.* II, Tit. XIV, 2
Paulus (on Edict 3).

(a) by an act, a letter or messenger ; a convention may be made by implied agreement. (b) If the transaction be *mutuum*, anything given by *B* in *C*'s name can be recovered by the *condictio*¹. (c) A pupil can bring *actio utilis* on a *constitutum* made by his guardian in his name. (d) If in making settlement of *dos* on a woman, stipulation was that it should be restored to her or her descendants².

Gaius³ says : ' Complete transferability (singular succession) of obligations was unknown to jurisprudence till modern legislation gave validity to contracts with an *incerta persona* except as a member of a class; in other words, to papers payable to a holder or bearer. In Roman law the theory of assignment did not go beyond *actio utilis*.

RULE IV.—The act or forbearance constituting **CAUSA** must be of some value in law ; the inadequacy is a valid ground for rescinding a contract.

Acts and forbearances must be measurable in some money value⁴.

In Roman Law in the case of purchase for less than half the true value of the thing sold, the purchaser had the option to give up the thing or make up the full value. In English Law to set aside the transaction as showing want of consent or free will, the inadequacy must be so gross as to shock the conscience of a reasonable man.

Arrha amounts to making the contract practically solemn⁵. If earnest is given, the *purchaser*, if he refuses to fulfil it, will forfeit what he has given ; if the *seller* refuses, he has to restore double, even though no agreement was made expressly on the subject. This applies both to written and unwritten contracts. Earnest operates in two ways : (a) the property in the *arrha* does not pass to the holder of the *arrha*, but is

¹ Dig. XII. Tit. VI, 147.

² Hunter's *Roman Law*, p. 465.

³ Poste, p. 407.

⁴ Dig. 40, 7, 9, s. 2.

⁵ Just. 3, 23 pr.

either returned or entered in satisfaction of the part of the price. (b) It is a mere corroboration of the contract; it is not a substitute for performance of the contract. As a general rule the motive from which a promise is made is not essential so far as the juristic effect is concerned, and it does not matter whether the person who enters into contract gains his object or not by that act. There are four cases in which motive is essential: (a) *Metus*. Here the party is forced to enter into a juristic act by means of fear and threat. The prætor relieved the party. (b) *Dolus*. Here the party was under deception, fraud, want of good faith; *actio doli* was granted by the prætor. (c) Substantial error. This is important in contracts of sale, letting and hiring. (d) In *donatio* a person from motives of liberality makes over to the other person some property or benefit. Gifts are revocable on the ground of ingratitude on the part of the donee.

RULE V.—The object of an agreement must not be impossible, uncertain, illegal or contrary to *jus civile*.

In civil law the promisor is not liable for not performing his contract, if the impossibility arose from circumstances not brought about by his neglect or wilful default. The object of contract is to require good faith and fulfilment of the promise and not to make the promisor an insurer against risks unforeseen and outside the bargain.

In English law the grounds of impossibility are to be set out expressly to avoid the effect of impossibility. A stipulation for conveyance of *res sua* which the stipulator believed to be *aliena* is void¹. The impossibility may be physical arising *ex post facto* without any default on the part of the debtor². The subject may be non-existent or may be impossible in nature or law. It may be impossible *ab initio* or impossible afterwards. It may be a relative or an absolute impossibility. A promise to do an

¹ *Just, Inst*, III, 19, 2.

² *Dig.* 46, 3, 92.

act which is impossible *ab initio* is void. No rights can arise¹ unless the promisee was ignorant through no fault of his and though having acted on the contract, it is impossible to put him in the same position. In such a case indemnity was given. The impossibility must be absolute and not relative. If it is due to the promisor's own fault, it will not excuse him².

There were two kinds of wagers and each was differently treated: (1) If the transaction was entered into with a desire to provide against a loss or destruction of the thing, it was binding and could be enforced by action³, *e.g.*, insurance was allowed. (2) Where the object was to make unrighteous gain, as by gambling, it was forbidden. The law imposed a penalty on those who took part in such wrongful objects. The word *sponsio* was used when the parties waged a sum of money on the result of an action to wait the decision. Later on the meaning of *sponsio* was to take part in a game of skill. In English Common Law wagers were valid if they were not indecent. The law did not countenance a desire to bet and losses paid on bets may be recovered by means of *actio conductio indebiti* within fifty years⁴.

Contract may be indeterminate owing to the alternate nature of the obligation. In contract the option belongs to the debtor⁵. The debtor in the alternative *obligatio* may reclaim the part which he has paid and may pay in the other alternative mode⁶, but this option comes to an end after *constitutum* is made. If the creditor accepts an *acceptilatio*, he cannot claim the alternative unless he reserves his right expressly.

If the object is indeterminate, the contract is void⁷.

¹ *Dig.* 50, 17, 185.

267, 381; *Inst.* III, 28.

² *Just* III, 1; *Dig.* 19, 2, 25,

⁵ *Dig.* 45, 1, 138, s. 1.

8.

⁶ *Dig.* 45, 1, 75, s. 8.

³ *Dig.* 19, 5, 17, s. 5.

⁷ *Dig.* 45, 1, 115.

⁴ *Van Vangerew*, secs. 595—615; *Savigny Obligation* I,

If *causa* fails, restitution is allowed. The *Digest* Failure of *Causa*. gives five cases in which action can be brought to recover what was given: (1) Where money not due is paid by mistake (*indebitum*). (2) Where property has been given in terms of a compromise which is not carried out. (3) Where given under a condition (*conditionem*) which is unfulfilled. (4) For a past consideration *ob causam*¹. In order to base an action for restitution on the ground of failure of *causa*, it is necessary to deliver that property in pursuance of a compromise of claims or on account of any of the *causa* mentioned above, or to carry out a condition or for something to be done, and there is failure of that condition or object. (5) For future consideration *ob rem*. What is given for something to be done must be the subject of an action for return on the grounds of justice and fairness. The technical Roman term is *causa data causa non secuta*. *Indebiti solutio* was allowed to recover what was paid under mistake. There must be nothing against good conscience in returning the money. Error must be of fact and not of law. Ignorance of law is no excuse². Pothier maintains that even if there is error of law, money can be recovered³. It is a clear rule of law that a person is entitled to the return of what he ought not to have paid even though it was through a mistake of fact. Julianus and Paulus are of opinion that a debtor, who after discharge pays a debt, has no right to repetition. Restitution should be allowed even though under mistake of law if there is no natural obligation, because a man ought not to be enriched at the expense of another. Pandects refer to error only. It may be error of law of fact or of law. Pothier is of opinion that error of fact or law will be a ground to claim restitution; Vinnius believes that restitution can be claimed in all cases of error, either of law or of fact, because *condictio indebiti* is an equitable remedy. The *Digest*, Book XII, Tit. VI, treats of *condictio* for

¹Dig. XII. Tit. VI, 65 III, 21 and IV, 13, 2.

Paulus on *Plautius*.

³Obligations trans, by

²Code I 18, 10; *Just Inst*, Evans, pp. 437-40,

money paid that was not due. Papinian (on Edict 26) says where a man pays what he does not owe in ignorance of fact, he can sue to recover it by *condictio*; but if he paid it knowingly he cannot recover. Pomponius (on *Sabinus* 9) says when money which is not due is paid by mistake, the action may be for the return of either the very money paid or an equal amount. Pomponius (on *Sabinus* 21) says it is only right as a matter of natural law that no one should become richer to the injury of another. Savigny is of opinion that money paid under mistake of law cannot be recovered by *condictio indebiti* unless it be proved that ignorance is excusable and not gross negligence¹; in English law mistake of fact is an excuse; but mistake of law is not, and money cannot be recovered. Action of *condictio* resembles the action for money had and received in English law.

RULE VI.—Any motive to return a benefit already received will give rise to natural obligation with certain results.

The origin of natural obligation is threefold: (1) the freewill of the debtor; (2) unjust enrichment of the debtor²; (3) the desire to make reparation for injury in the past. In Roman law past *causa* will give rise to natural obligation. Non-actionable obligation may be the result of (a) absence of formalities of civil law; (b) or incapability of the contracting parties or may be relating to *dominus*, which can be enjoyed by certain persons only; (c) disregard for *jus gentium*; (d) non-observance of the rules of procedure. Instances of natural obligation: (1) a wife pays *dos* by mistake. Here money could not be recovered by *indebiti condictio*. (2) Money may be paid in excess of the sum due. Here the pupil could not sue for the excess. (3) An excessive payment may be made in consequence of *actio pro socio*. Here the *condictio* for the excess is not allowed. *Senatus Consultum Macedonianum* allowed action to

¹*System*, Vol. III, App. s.s.

²*Dig.* 12, 6, 14.

be brought on the ground of natural obligation. (4) Where an action could not be brought owing to prescription, natural obligation persists. In English law moral consideration is not regarded as legally binding; the case of *Eastwood v. Kenyon* decided that motive is not the same thing as consideration and Lord Mansfield's remark that moral consideration was legally binding was overruled.

RULE VII.—The abandonment of a right or bona fide claim for a reasonable time is a valid causa.

In Roman law obligation is a bond or tie, and figures very large y in the subject of *obligatio*. The words *nexum*, *nectere*, *contractus solutio*, *solvere* are all intended to give that idea. An obligation is dissolved by untying the knot, and the general term of *solvere* is used to describe that process. The general rule is that *causa* which created obligation must have a corresponding mode of release. Literal contracts must be extinguished by writing on the ledger acknowledging the receipt. Hence to extinguish an obligation, certain legal steps had to be taken, otherwise the parties continued to be liable. There were a few cases in which the plea of *exceptio doli* could be used. The right could be extinguished by abandoning the claim, and partial payment in satisfaction of the whole was valid, if the creditor gave his consent ¹; and the peculiar rule of English law, as laid down in *Pinnel's case*, that a smaller sum of money cannot be a good discharge for a larger sum of money at the same time and place between the parties does not obtain in Roman law.

RULE VIII.—Compromise of a disputed claim is a good causa.

Transactio might take the shape of an agreement *pactum* convention, or might be confirmed by *acqui-
lian* stipulation, i.e., a general renewal of all preceding claims accompanied by a formal release and by a covenant of penalty for breach. It affected the

¹Gaius III, 168; (Poste).

rights of the parties only. To be a valid *transactio* (or compromise) the existence of doubt is necessary¹. If the terms of a compromise were fulfilled, the original action revived. An agreement for settlement of a cause or suit extinguished the action². In English law there must be a *bona fide* dispute as in Roman law; hence any underhand dealing will vitiate a compromise. Each party surrenders some alleged rights in order to remove uncertainty. Such a compromise could give rise to a *pactum de non petendo*³. Similarly an agreement to refer a dispute to arbitration is binding and a valid *causa* exists for such settlement.

Composition with creditors is valid. If a creditor agrees with his debtor not to demand payment, exception *pacti conventi* may be urged exactly as if the payment were made. Such a defence could be raised both against the person who actually accepted composition and those who were bound by it⁴. In English law each creditor foregoes his right in consideration of other creditors also foregoing their right to enforce their whole claim against the debtor.

RULE IX.—An antecedent act gave rise to natural obligation which was enforced by praetorian actions.

In Roman law an antecedent act or forbearance or promise of one party gives rise to natural obligation; and *condictio* was allowed to recover money. This is not so in the English law of consideration because consideration must be either present or future and not past. The rule in Roman law was that a *nude pact* had no binding force; but praetor gave right of action to enforce certain pacts. They were called *pacta vestita* and they were either civil or praetorian. Action was allowed on *pacta adjecta* for collateral agreements. The praetor allowed *constitutum debiti* to discharge a liability already incurred.

¹ *Digest* II, 15, fr. 1, 27.

² *Digest* II, 14, fr. 17, sec. 1.

³ *Code* 2, 4, 171.

⁴ *Just.* IV, 14, 4.

RULE X.—Any promise by engaged couple or by third persons on the ground of marriage taking place is a valid cause and will be enforced.

There is a dispute among jurists if breach of promise to marry (*sponsio*) was actionable. Ihering is of opinion that promise to marry was not actionable at all; while Giraud is of the contrary opinion. Ihering gives as reason that the marriage contract being absolutely voluntary, till it is completed the parties can, at their will, dissolve the bond, otherwise the freedom of the parties would be restrained. The parties may stipulate for a penalty in the event of the breach of contract to marry. In later law such a stipulation was regarded as *turpis pactum* and *exceptio doli* could be urged. Bryce¹. Where *arrahsponsalia* was given on betrothal and breach occurred, there being failure of contract, the property must be returned unless the breach was for a just cause by one party only or by mutual consent. In English law a promise to marry is actionable; a promise by a third party to give something in consideration of marriage taking place is valid and is governed by the rules of *donatio*. Mutual promises are binding if the *causa civilis* is present, as in the four privileged contracts of Rome.

The consensual contracts are bilateral because both parties enter into mutual obligation to do something. Verbal, literal and real contracts are unilateral. There was a right bestowed upon one party only, while duty was imposed upon the other; while in contract of sale, for instance, as soon as the price was agreed upon the contract of sale was complete. Innominate contracts were of four kinds: (1) *Do tibi ut des*: I give, that you may give. (2) *Do ut facias*: I give, that you may do something. (3) *Facio ut des*: I do something that you may give. (4) *Facio ut facias*: I do something that you may do something. In these contracts it is

¹*Studies in History and Jurisprudence*, Vol. II, pp. 393, 394; *Digest* 23, 1, "On Sponsalia"; *Digest*, 45, 1 pr. *Codex* 5, 1, 1.

essential that something should be actually given or performed by one of the parties in order to constitute an obligation against the other ; in bilateral contracts a promise of one party is quite enough to give rise to action for the promise of the other party.

In Roman law mutual promises being *nuda pacta* were not enforceable ; but if penalty were added in case of default, action was allowed to enforce that penalty in case of default of either party.

RULE XI.—In every kind of obligation *causa* is essential : a deed must have a *causa*.

The idea of specific performance of contracts was not developed. All that the praetor could do was to give a formula to the *judex* who would condemn the party who was found liable to pay damages. This is the peculiar result of the procedure which prevailed in Roman law. This result was mitigated by means of the praetorian stipulation. The party would be bound over to give the very thing ; and by means of stipulation the result was indirectly achieved ; the party who feared his adversary would ask the *judex* to get stipulation to bind over the other party to secure the fruits of the action.

In Roman law seals were not required to authenticate any documents except wills. Any seal on a will was sufficient¹. Sir Henry Maine believes that there was one common form of contract and conveyance called *negotium per aes et libram*. He describes the process as follows : “ Let us conceive a sale for ready money as the type of the *negotium*. The seller brought the property of which he intended to dispose, *e.g.*, a slave, the purchaser attended with rough ingots of copper which served for money and an indispensable assistant, the *libripens* presented himself with a pair of scales. The slave with certain fixed formalities was handed over to the vendee, the copper was weighed by the *libripens* and passed to

¹*Inst.* II, X, 5.

the vendor. So long as the business lasted, it was a *nexum* and the parties were *nexi*; but the moment it was completed, the *nexum* ended. And the vendor and purchaser ceased to bear the name derived from their momentary relation. But now let us move a step onward in commercial history. Suppose the slave is transferred, but the money is not paid. In that case the *nexum* is finished, so far as the seller is concerned, and when he has once handed over his property, he is no longer *nexus*; but in regard to the purchaser, the *nexum* continues. The transaction as to his part of it is incomplete and he is still considered to be *nexus*. It follows, therefore, that the same term described the conveyance by which the right of property was transmitted, and the personal obligation of the debtor for the unpaid purchase money. We may still go forward and picture to ourselves a proceeding wholly formal in which nothing is handed over and nothing is paid; we are brought at once to a transaction indicative of much commercial activity, an executory contract of sale¹.

Hunter² concludes that "there is no sufficient evidence to connect the stipulation by way of descent with the *nexum*, but that such evidence as exists points rather to the stipulation as representing an element in law equally primordial with the notion of property itself." Savigny and Ortolan agree with Sir Henry Maine that *nexum* was the first known contract. Savigny says *mutuum* was the earliest contract to be enforced by means of action, and derives *stipulatio* from *nexum*, which in turn is derived from *mutuum*. *Nexum* was a fictitious sale used in order to protect other contracts. *Stipulatio* and *expensilatio* were a mere species of contracts of loan. *Condictio* could be brought to enforce such contracts and not *actiones bonæ fidei*, because parties depended on good faith, the protection of law was not required, and the parties could settle the matter amicably.

¹ *Ancient Law*, p. 333.

² *Roman Law*, pp. 536—540.

Hunter traces the existence of stipulation during the time of the XII Tables ; hence Savigny's view that stipulation existed after *nexum* was abolished in 326 B.C. is not historically correct.

Ortolan agrees with Savigny in holding that stipulation is a derivative contract, but believes with Sir H. Maine that *nexum* was the earliest contract. In *nexum* the ceremony of the balance and bronze was one part, and the other part consisted in specifying the nature of the obligation. The ceremonial part was gradually dropped and stipulation was the result.

Hunter does not admit that there is any connection between the words *spondeo* and *nexum* at all, because, according to him, there is no evidence to show that conveyance was derived from *nexum*. In the time of the XII Tables there is nothing to show any connection between the two. *Nexum* required the presence of five witnesses ; stipulation did not require any witnesses to be present. In *nexum bona fide* action was allowed ; while in stipulation strict *juris* action was allowed.

Moyle says the real and consensual contracts were said to be *juris gentium*, and the supposition that *mutuum* was actionable at Rome before *stipulatio* is not supported by the facts of history ; *mutuum* is quite distinct from other real contracts.

B.—THE DOCTRINE OF CAUSA AS IT AFFECTS THE LAW OF PROPERTY AND CONVEYANCE.

RULE I.—The presence or absence of the *causa civil* changes the legal nature of the transaction.

There is cause in *donatio* : it is one of the modes of acquiring property recognised by the civil law. In early law a promise to give was not enforceable unless it was made by *stipulatio*. Antoninus Pius made a mere formless promise actionable between parents and children ; Justinian enacted that such a promise was actionable between all persons¹. In English law a

¹Code 8, 54, 35, 5.

promise to give, unless under seal, was not actionable. Gifts *inter vivos* cannot, as a rule, be revoked; the old law allowed the paterfamilias to revoke a gift made in favour of an emancipated child during their lives. Diocletian limited that right to proved cases of ingratitude or when children were subsequently born to the donor. Justinian specified that in cases of ingratitude gift could be revoked¹. In English law if a gift is voluntarily made, it cannot be revoked on the ground of ingratitude or of children being born to the donor afterwards. Gifts between husband and wife were forbidden². If the amount to be given by way of gift exceeded a certain limit, it was to be done under forms prescribed. The *Lex Cincia*³ forbade gifts between kinsmen.

In English law delivery is required; if the gift is incomplete, it cannot be treated as a trust. In Roman law all that the law required was registration in case of gifts exceeding a certain amount in value. In Roman law *fidei commissa* could not be created *inter vivos*.

The conveyance by 'copper and scale' was the form mostly used to transfer property. It was symbolic till *jus gentium* recognised real and consensual contracts. The property could be acquired by *traditio* and *possessio*. They were regarded as good *causæ* to acquire property also. *Usucapio* ripened *possessio* into ownership. It must be *bona fide* and *ex justa causa*. *Nexum* was a loan of raw copper. The copper was weighed out and delivered over to the borrower who agreed to give an equal quantity of some kind of goods. *Dotis dictio* was a formal contract. There was an oral declaration on the part of the bride's father or male cognates, of the bride herself or of the debtor setting forth the amount which was intended to be given. The sanction was religious. In the XII Tables we find the object of the legislator to be to give as much force to the verbal

¹ Code 8, 56, 10.

³ B. C. 204

² Digest 24, 1, 1.

words of *nexum* as to the words of *sponsio*. *Nexum* modified the harsh treatment of debtor by creditor in life or limb.

In Roman law the law of trusts *inter vivos* was not known as in English law. The idea of the division of property into legal and equitable was not developed.

RULE II.—The alienation of property, though valid as against the transferor, may be set aside for want of causa.

The prætor did not interfere to use his power to mitigate the harshness of law in the case of *debtors* who would not pay. Gaius¹ says the estate of a bankrupt may be sold during his life-time or after his death. It is sold in his life-time when he defrauds his creditors by absconding or when he is absent from the forum and undefended or avails himself of *lex Julia* and surrenders his estate, or after judgment being given he allows the period to expire. His estate can be sold after his death when it is certain that he has left no heir or lawful successor. Justinian² says when a debtor who has made a cession of his goods to his creditors acquires a fortune which makes it worth their while, the creditors may compel him by action to pay as much as he can, but not more. Debtors would petition the Emperor to allow the creditors to grant respite for some time or to accept a bankruptcy. The creditor who had the greatest amount to recover had the option to grant respite; if the amounts of debits were equal, the majority of creditors had to decide; if the creditors were equally divided, the request was granted.

The alienation of property could be set aside in favour of creditors on the following grounds:—

- (1) If a debtor delivered to a third person his property with the intention of defrauding his creditors, the property continued to be part of the debtor's property and the creditors had a

right to rescind the transaction¹. Any act by which a debtor diminished the amount of his property which was to be divided among his creditors was a fraudulent alienation. The debtor was not bound to add to his property².

Instances of fraudulent alienation are: Alienation of property, acquittance of debt or pledge or giving property as a dowry is void³. If a debtor allows the time of prescription to run or loses a servitude by non-use, he makes a default prejudicial to the creditors. The intention must be to diminish the assets available for creditors generally⁴.

- (2) If alienation or acquittance were made without giving any value, it was set aside, even though the person in whose favour it was made was quite innocent and had no knowledge of the fraud being practised on the creditors.
- (3) But if value were given, the alienation would stand unless fraud were known of that third person⁵. If there were any subsequent alienation from the purchaser to a person who did not know of the fraud, the transaction would not be affected⁶.

Titius being in debt conveys all his property to his freedmen who were his children. As at the time of that conveyance he knew himself to be in debt and alienated the property, the natural effect was to defraud his creditors; the Court would set aside the transaction in favour of the creditors though his children had no knowledge⁷. Creditors can bring *actio pauliana* against: (a) the person who paid the value with knowledge that fraud was practised on the creditors⁸; (b) and also against one who did not know of the fraud but had paid no value⁹.

¹ *Inst.* IV, VI, 6.

² *Digest* 50, 17, 134.

³ *Ibid.* 42, 8, 1, 2; *Ibid.* 42, 8, 8, 10, 14.

⁴ *Ibid.* 50, 17, 79.

⁵ *Ibid.* 42, 8, 6, 8, *Codex* 7, 75, 5.

⁶ *Digest* 42, 8, 9.

⁷ *Ibid.* 42, 8, 17, 1.

⁸ *Codex* 7, 75, 4.

⁹ *Digest* 42, 8, 25, 2.

Action can be brought by and against the heirs of these parties. If a person has lost possession of a thing fraudulently conveyed to him, or has been fraudulently acquitted of a debt, *actio pauliana in factum* was allowed. The period of time within which the transaction must be set aside was one year and after that time, to the extent of the property which was in the hand of the alienee¹.

The ground of *restitutio* is fraud of the alienee and the creditor's action is in *rem*. *Actio pauliana* was personal² while *actio in factum* was available against the *bona fide* alienee. Savigny (*Obligations*) says there were two modes of proceedings against insolvent debtors: (1) *manus injectio* or personal execution. It was allowed where judgment or confession on which execution issued was on a money loan. (2) Execution against property was granted in other cases³.

The effect of bankruptcy upon the debtor was that he lost all right of disposal, not ownership of the property, and the property was managed by an assignee in bankruptcy appointed by the creditors. The creditors having a right to special things ranked in preference to others (*separati ex jure domini*). Those creditors who had claim against the inheritance might demand *beneficium separationis*.

By means of *actio contributoria* trade creditors got preferential rights⁴.

In English Law creditors can set aside alienations under 13 Eliz. c. 5 and 27 Eliz. c. 4; the *actio pauliana* resembled the English Statutes. It covered a more extensive ground, in setting aside conveyances with a view to defraud creditors, than the English Statutes the period allowed was shorter than in English Statutes, in setting aside conveyances. In Roman Law there was no provision similar to the Bills of Sales Act, 1882.

¹ *Ibid* 42, 8, 10, 24.

² *Ibid* 22, 1, 38, 4.

³ Moyle, *Justinian*, p. 310.

⁴ *Von Vangerow* Secs. 574—

575; Arnts Secs. 218—226;

and Puchta Secs. 248—280

deal with the subject of bankruptcy in Roman law.

C.—OBLIGATION TO DISCLOSE CAUSA.

The whole spirit of Roman law was to insist on the publicity of the transactions and *causa* was clearly set out. In the XII Tables the solemn declaration of promise or agreement was accomplished by an appeal to the gods; and the whole transaction was carried out in public. Formalism alone led to the formation of contract. In early days the verbal declaration on the part of the promisor was couched in solemn forms; and the oath-breaker was an outcast. *Spondeo* was pouring out wine at the conclusion of a sworn compact. It was no more than an accessory ceremony. The list of Civil *causæ* was gradually extended. But there was no legislative enactment to set out *causa*. In contract *litteris* the entry in the ledger was conclusive proof of the obligation and if the other party did not dispute it within two years it created a binding obligation and *exceptio* was not allowed by way of defence. In sale the price was to consist of a definite sum of money. If it were not a fixed sum the contract was not complete. There are no special enactments as in English Law to disclose the nature of consideration.

CHAPTER VIII.

THE DOCTRINE OF CONSIDERATION IN ENGLISH LAW COMPARED WITH THAT IN ROMAN- DUTCH LAW.

Roman Law was studied in Holland and the Dutch school of Jurists arose in 1575 when the University of Leyden was founded. Grotius (1583—1648), Vinnius (1588--1657), Van Linden (1625—1682) and Huber (1669-1732) were the great jurists of that school and flourished in the 16th and 17th centuries. Voet (1619—1677) Wissenbach (1607—1665), Scheitinga (1708—1765) and Bynkershoek (1673—1743) lived in the 18th century. These Dutch jurists have contributed a vast amount of scholarship to the doctrine of *causa*.

Prof. Fockema Andrae gives an historical account of the doctrine of *causa* during : (a) the Germanic period from the accession of Germans to the accession of Clovis ; (b) the Frankish period up to 1581 ; (c) the Feudal period till 1806 ; and (d) the Republic when the Dutch declared their independence.¹

“ The History of Contract,” says Prof. Fockema, “ is the History of a transition from rigid form to adaptability.” The typical examples of contract are sale and exchange, both reciprocal and immediate in operation, and the idea of enforceable promises arises late. The promisee took a pledge for the performance weddle (*radiatio*). *Vindicatio* is used as a symbol. *Fastua* is handed over to the creditor. Later on this is dispensed with. The handshake and God’s pennies are a mere modification of the same idea.

¹Old Dutch Law, 1900 ; Law, ch. 14, pp. 566—586.
Wessels, History of Roman-Dutch

On the other hand, Tacitus says a promise seriously made should be scrupulously made¹ and that it is a base thing to violate a promise². Among the writers of the 16th and 17th centuries, who collected the old German Laws, Grotius and Vinnius both speak of the great sanctity of the promise. In *Lex Paruvarium* (tit. 16) a provision was made to swear to a fact as of great consequence.

This promise was distinct from *obligatio juris*, because it did not create *vinculum juris*; there were no consensual contracts among the early Germans; 'real' contracts were well known because there was nothing to be done at a future date and the whole transaction was completed at once³. Exchange and barter are the earliest forms of contract, in which one party exchanged one commodity for another. *Vadium* or security was taken when a thing was to be given in the future. Roman Law was studied by lawyers in the Netherlands and was accepted by the Courts of Justice, and the formalism of German Law was displaced by the Roman Law of *obligatio* (contract) which was identical with the law of *Corpus Juris*; thus we find the Law of Contract and the Doctrine of *causa* prevailing there. Dutch writers like Grotius refer to the Roman Law of *causa* in treating the law of obligation; while side by side German customs prevailed; the Roman maxim *ex nudo pacto non oritur actio* was not accepted in Roman-Dutch Law; in Holland a serious promise was binding and legal effect was given to it. In 1755 Heineccius writes that the Romans distinguished between pacts and contracts. Pacts were divided into *nuda* and *non nuda*; and *non nuda* pacts were of two kinds, *legitima practoria* and *adjecta*. 'The Germans' writes Heineccius, 'were ignorant of this distinction and they attributed no less force to agreements deliberately made than did the Romans to their contracts entered into with due solemnity.' The Germans from the earliest times esteemed no virtue higher than good

¹ *Germany*, ch. 24.

³ Schroder, p. 283.

² Tacitus, *Annals* XIII, ch. 54.

faith, the subtleties of Roman Law were not adopted by them, but it was the general rule and practice that all promises based upon any reasonable ground (*redelyke oorzaak*), in whatever terms expressed, and whether the parties were together at the same place or not gave a right both of action and exception¹. Wessel² writes to the same effect. A deliberate and serious promise must be performed, and was part of the law of Holland.

Meaning of
Cause in
Roman-
Dutch Law.

In Roman Law certain pacts were enforced; the rest were *nuda pacts*, they could raise natural obligation and could be used by way of defence; the question of consideration in the English sense was never thought of by Roman lawyers. The nations of Europe did away with the subtleties of Roman Law and gave validity to pacts both as giving rise to action and exception. The Germans attached such great importance to good faith that if a contract was deliberately made, it was enforced. Heineccius³ says, among Germans, pacts and conventions gave ground for action as well as exceptions. Grotius⁴ says the subtleties of Roman Law on this point were no longer observed in his time. The German ideas were probably influenced by Canon Law. Grudelinus *de jur*, Nov. 35, p. 103, says, according to our law, *nuda pacta* give rise to a binding obligation and an effectual remedy. Many writers⁵ agree with the view that a promise seriously made is binding in law.

Van Leeuwen 1625—1682⁶ is of a contrary opinion. He fell into the error of general application to a special rule of Dutch law which required that in certain cases of written obligations, such as bonds, the *causa debiti* should be specially stated in the document of debt. This

¹ Grotius, *Institute* 3, p. 52. Maasdorps trans.

² *History of Roman-Dutch Law*, p. 572. . . .

³ *Elements of German Law*, sec. 340.

⁴ *Institutes* 3, 2, 52.

⁵ Voet (1619—1677) *Ad*

Pand. 2, 4, 9; Groenegewegen (1613—1652) *de leg Abrogati Code* 2, 3, 10, 13, 21: Vinnius (1588—1657) *Ad Inst.*, p. 596 Dekker's note to Van Leeuwen's *Commentaries*, Bk. IV. 2. sec. 1.

⁶ Bk. IV, I, sec. 5,

is a special rule. Of course, if a promise is made in jest, or is for an immoral purpose, no action will be allowed¹. Hence the origin of the rule that contract must have a proper or reasonable cause to be enforceable in law.

The word *causa* is Latin, while *oorzaak* is a Dutch word. *Oorzaak* means, in reference to contract, ground or reason of contract, that which brought it about.

In Roman Law *causa* meant in the early stages that characteristic which made the contract actionable². Later on *causa* was used to denote ground or reason for the undertaking being embodied in a contract. Ulpian states that *stipulatio sine causa* gives no ground of action and if sued upon the claim it will be defeated by *exceptio doli mali*. By cause he means not the formality of *stipulatio*, but the reason or ground for entering into that formality³. If that ground does not exist, the *stipulatio* cannot be sued upon, even though the formality be there. In this sense the word *causa* or *oorzaak* is used in Dutch writings.

Grotius says all promises based upon any reasonable *causa* (*eenige redelyke oorzaken*) gave a right of action and exception. By reasonable *causa* he means any proper or legitimate ground or reason. Van der Keessel (1738—1816) and Van der Linden (1756—1835) use the word *causa* in that sense. Grotius, in his edition of 1667, gives a list of the Dutch meanings of Latin words. In that book *causa* is used as the equivalent of the Dutch word *een waerom*, meaning ground or reason, the why and wherefore of any matter.

Toullier, a French writer on the Code *Le Droit Civil Francias*⁴, says: "By the cause of an obligation or of a contract the code means the motive for making the promise which it contains, the reason why (*le pourquoi*) it was made." The Dutch and French definition of the Latin word *causa* are identical. Le Clèrq, another

¹ Voet *Ad Pand.* 2, 14, 9 and 16.

³ *Digest* 44, 4, 2, 3.
⁴ 3, 4 sec. 136.

² *Digest*, 44, 4.

French writer¹, says : " It is impossible that one should will anything without motive or without cause ; one of these things always determines the will of a man and it is necessary that the intention should exist in order that there may be a contract and in consequence an obligation. It would have no effect if there were no cause."

Pothier² says that contracts of beneficence, the liberality which one of the parties intended to exercise towards the other, is a sufficient cause for the engagement contracted in his favour.

Couldsmi³ says *causa* or *oorzaak* is the ground or reason for the contract and may be the desire to do another a favour or to discharge a lawful obligation or to secure any other lawful object or purpose. Voet⁴ says in Roman-Dutch Law every agreement not manifestly impossible, made deliberately and seriously by persons capable of contracting and having ground or reason which is not immoral or forbidden by law, may be enforced by action subject to any special legal defence which may arise to particular cases. Dekker⁵ has expressed the same thing and considers reasonable cause as equivalent to physical and moral probability. Grotius uses the words *redelyke oorzaak* to mean reasonable ground and *causa* and not as equivalent to *quid pro quo* or Consideration of the English Doctrine, because he refers to good faith as the stable basis of contract. He clearly states that the formalities of Roman Law were not required in order to make a contract binding. The Dutch Law required a good ground for a belief that the parties seriously intended to be bound.

Roman Law regarded *nudum pactum* as an agreement made without the due solemnities required by Civil Law ; and the maxim *ex nudo pacto non oritur actio*

¹ *Le Droit Romain*, Vol. 3, p. 18.

² *Obligations*, Vol. 1, Art. 4

³ *Pandecten System*, Vol. II, sec. 33.

⁴ 2, 14, 9 and 16.

⁵ Note to Van Leeuwen's *Commentaries on Roman-Dutch Law*, 4, 2, sec. 2.

meant that an agreement made without proper solemnity could not be actionable. Later commentators ascribed to that maxim a wider meaning; the maxim was interpreted to mean a contract based on the agreement of the parties¹. From the 13th century the maxim had undergone a change in meaning; it meant that a serious and deliberate agreement was binding in law even though there was no formality observed. Hence it follows that the Germans could not have given such a narrow meaning as is attributed to it. Heineccius nowhere suggests such a meaning in his review of German Codes and there is no indication that in German Codes more than a serious agreement was required to give it a binding force. Grotius in his writings is clear on that point, while Zypaeus, whose authority was very high in the Southern States of the Republic, says no formality was insisted on by law to make a binding contract; Gudelius is of the same opinion. Vinnius² says an informal agreement, if it was made seriously and with deliberate thought, would give rise to an action. Graenewegen writes to the same effect and attributes this change to Canon Law and strong moral sense that breach of promise was an immoral act. Paul³ believes that the maxim *ex nudo pacto oritur actio* obtained in Holland, and in Friesland the Roman maxim was very rigidly followed. In Holland custom was followed in preference to the Roman maxim. Jan Voet⁴ comes to the conclusion that a *nude pact* depends on agreement alone and it is binding if it was seriously made. Hence during the 17th century text-writers of repute are of one opinion on this subject that the Roman doctrine, that some formality must be present to establish a contract, was not the law, of Holland, which followed the German and Canon Law. According to them an agreement to be legally binding must require the consent of competent persons to make a voluntary and deliberate agreement which shall be

¹Voet's *Begnisden*, 3, 14,
13.

³Voet *Inst.* 3, 14, 5.

⁴Bk. III, c. 14, secs 13, 14.

²*Inst.* 3, 16.

physically possible and not contrary to the moral sense of the community. The Canon Law might have borrowed this idea from the customs of the Germans of Western Europe in the Middle Ages. This question is still debated and discussed, not only by writers but in actual practice the controversy prevails in South Africa to-day. This controversy has arisen in recent times from the writings of Van Leeuwen. In *Censura Forensis* (4, 2, 2) he expresses a different view to that given above and the Roman maxim (*ex nudo pacto non oritur actio*) was accepted in the law of Holland. Dekker, the annotator of the work of Van Leeuwen, points out the mistake of that author. Van Leeuwen's work on Roman-Dutch law written after the *Censura Forensis* does not contain the statement.

Wessels writes : " If we accept the view of Grotius and Voet as a fair account of the law of Holland in the 17th century, it becomes difficult to see when and in what way the law and practice of that time was altered¹."

Prof. Fockema says writers of the period of the Republic, here as elsewhere, were ensnared by the Roman terminology, and speak of the cause of obligation, and of the promise. In the sources the matter is practically omitted. The only time the word is met with, its meaning is quite clear. The Landrecht of Oldambton of 1618 enacts that all transactions are null and void which are against good manners and have their origin in dishonourable causes. This is quite clear and no difficulty appears in the passage. An unpermitted dishonourable cause is a circumstance which makes the transaction contrary to good morals and the cause may be explained as an object which the actor has in view ; Dekker assigns this meaning to the word cause in his note to Van Leeuwen². In South Africa, Dutch

¹*History of Roman-Dutch Law*, p. 572. *Comment on the Institutes of Cape Law*, Vol. III, p. 41 (n)

²Kotze's translation, Vol. 121. II. p. 10 ; see also Maasdorp's

authorities are freely cited and Voet is considered of great authority but not in Ceylon ; Wessels says that Roman-Dutch jurists rule in Ceylon in the present time.

The States of Holland Resolution of 25th May, 1735, declare that the High Court and other judges in the province of Holland and West Friesland must do justice according to the law and ordinance, according to privileges and well established custom and usages, and in default of these, according to the written law (Roman Law)¹.

Roman Law had not evolved a general theory of contract. To make an agreement binding, there must be some recognised kind of contract or vested pact. In Roman-Dutch Law such distinction does not exist; All contracts are based on consent of the parties. An agreement to lend or exchange is as valid as an agreement to sell. Maasdorp defines contract as "any voluntary, serious and deliberate agreement to give or do or make good anything which is based upon any reasonable ground, cause or motive²." The elements of contract in Roman-Dutch law are that: (a) the parties must be competent to contract; (b) the subject-matter of the contract must be legal; (c) the contract must be voluntary, serious, for some reasonable cause; (d) formalities, if any are required by law, must be observed. In every contract there must be an offer and an acceptance of that offer. There is a controversy about the additional element being reasonable cause or serious and deliberate intention, or both, being necessary to make a contract enforceable³.

The word 'Cause' has a different meaning from the 'Causa' of Roman Law and Consideration of English Law. In Roman Law 'Causa' in reference to the making of a contract means that which gives to such a contract the actionable quality; it is a ground or basis of right

¹ Gr.Pl. Book (*Large Statute Book*) 7 D. p. 96. *Note to Van Leeuwen*, Vol. II., pp. 9, 32.

² Voet, 44, 7, 4, Grotius 3, 1, 10; 13, 3, 3; Dekker's ³ Maasdorp, *Law of Obligations*, Vol. III, pp. 34—55.

of action which the Roman law recognises. It consists in the observance of some legal form in case of formal contracts while consent is required in real and consensual contracts. *Pacta-vestita* consisted in the fact of being clothed with actionability. In Roman-Dutch Law there are no different kinds of contracts. An agreement was enforced because it was serious, voluntary and based on a reasonable cause, *redelyke oorzaak*¹. Kotze in a note to Van Leeuwen (Vol. II. p. 30) refers to the remarks of Paul Voet in his *Commentary on the Institutes* (3, 14, 5), that according to general custom *ex nudo pacto datur actio* is not accepted in Holland but is accepted in Friesland where Roman Law is followed. Vinnius observes: "It has been long since received in practice that *nudo pacto* is of some efficacy as a stipulation." Van Leeuwen² states that the rule of civil law is recognised in Dutch practice. In *Alexander v. Perry*³, Sir Henry de Villiers, C. J., stated that Voet pointed out the error of Van Leeuwen of mixing up *pacta nuda* with written agreements in which cause *debiti* must be expressed. De Haas has seen this mistake. Van Leeuwen says that in the law of Holland an action can arise *ex nudo pacto*. *Nudum pactum* is legally binding in Roman-Dutch Law if the parties are seriously agreed⁴. Reasonable cause or *oorzaak* means the ground, reason, or object of a promise enforced by law and has a wider meaning than consideration in the English doctrine⁵. Grotijs gives a wider meaning to *oorzaak* than the Consideration of English Law. Dekker thinks reasonable cause is equivalent to physical and moral possibility. The word *oorzaak* or *causa* denotes consideration as well as motive. Every consideration includes *causa*, but it is not true to say that every *causa* includes consideration. The translators of Van der Keessel and Van der Linden have identified cause and *oorzaak* and consideration in

¹Rood v. Wallach, 1904, T. S. 198.

²Lybrecht's *Notaries* p. m. 425.

³*Censura* 4, 2, 2.

⁴1874, Buch, p. 59.

⁵Gluck on *Pandects*, Bk. 12, Tit. 7.

⁶*Censura* 2, 4, 4.

meaning. Van der Keessel (p. 484) says: "A promise which is not founded on 'a *justa causa debendi*' will not give a right of action." Van der Linden says contracts are null and void when they have no cause (*oorzaak*) or a false cause or a cause which is contrary to good faith or morals¹. Van der Keessel says by the law of Holland an action will lie on a nude pact. Van der Linden² says that the rule of Roman law *ex nudo pacto non oritur actio* does not exist in the jurisprudence of Holland.

The dicta in *Alexander v. Perry*³ are contrary to the opinion of Roman-Dutch jurists and the two earlier cases⁴.

Dekker, Grotius, Voet and Vinnius are unanimous in the view that the Roman maxim *ex nudo pacto non oritur actio* does not obtain in Dutch law at all.

In *Alexander v. Perry Buck*, (1874, p. 59) it was decided that a contract not founded on a Consideration could not be enforced. The plaintiff sued the defendant for breach of contract of service. The defendant had promised to be in the service of the plaintiff for a certain period as a book-keeper, either party on giving three months' notice to be freed from the contract. The defendant left the service. When he was sued, he raised the defence that there was not any mention of Consideration in the declaration and no wages had been mentioned in the contract, nor in the declaration. The Court upheld this objection because the contract being *ex consensu*, the parties must be agreed as to certain points; in this case the remuneration for service was not mentioned; hence the contract was void and the Chief Justice expressed his *obiter dictum* that "Consideration as understood in English law was by Roman-Dutch law essential to support a contract." This dictum has given rise to the controversy in Roman-

¹ Bk. I, ch. 4, sec. 3.

² Note to *Pothier on Obligations*, Vol. I, Bk. I, Art. 2.

³ Buch 1874, p. 59.

⁴ *Louisa v. Van der Berg* 1830, 1 Mentz, 472; and *Jacobson v. Norton*, 2 Mentz, 221.

Dutch law. The dictum is based on the authority of Van der Keessel's Thesis, 484, and Van der Keessen's *Institutes*, 1, 42, 2; in both of which the translation is faulty. In *Mtembu v. Webster*, 21 S. C, 337 a correct translation is given. Fitzpatrick J. said: 'It is well known that the practice and feeling of the country is that there should be Consideration for a contract. I am of opinion that no man should be bound by a contract unless he received a *quid pro quo*. The Consideration might be very slight but there must be something to sustain a contract.' Kotze says that Roman-Dutch authorities are unanimous that action can be brought for *nudo pacto*. Voet says a nude pact made deliberately and in earnest is binding in the law of Holland. This view was accepted in *Louisa v. Van der Berg*¹ by the Supreme Court of the Cape of Good Hope, which held that a gratuitous promise, if accepted gave a right of action. In that case a father made a promise gratuitously to his son who was on his death-bed that he would liberate the plaintiff who was a female slave of the son and who had lived as a concubine with him. She was present at the time of the promise. The Court decided that the promise was legally enforceable, because there was reasonable cause for the affection which the father had for his son. The Court held (p. 472) that by the law of the Cape of Good Hope gratuitous promises may be legally proved by parol evidence. A gratuitous promise made to A for the benefit of B, which is accepted by A and B, will give rise to a binding promise and if that promise is not carried out, legal proceedings can be taken by B. The Court decided that there is no reason to believe that the promise was made solely from favour to the plaintiff or her sole account. It appeared that the deceased's son was anxious to free the child and as the object was to grant freedom to that child, there was no *turpis causa*. There is nothing to prevent one person from stipulating or bargaining for some benefit for another

¹ (1830) 1 Metz 472.

without the authority of the latter upon which stipulation such other person can sue.¹ In *Jacobson v. Norton*² it was decided that no consideration was necessary to support a promise to pay; it was not necessary in the declaration to set out any consideration as an inducement for the promise. The facts were that the defendant voluntarily undertook in his individual capacity to pay to plaintiff whatever sum should be found due and owing by an absconding partner of the defendant who had been previously a partner of the plaintiff, and was still indebted to the latter on account of dissolved partnership. In *Neethling v. Executors of Neethling*³ it was decided that but for the undertaking of indemnity to the plaintiff on the part of the deceased, the plaintiff would have taken measures against William Neethling to free himself from his liability as surety in the bond and this forbearance was sufficient consideration given by him to give a right of action to compel the deceased to perform his undertaking to indemnify the plaintiff.

The reasonable cause of Roman-Dutch Law is quite different from the consideration of English Law. In *Currie v. Misa* it was said 'Valuable consideration in the sense of law consisted either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.' Reasonable cause (*redelyke oorzaak*) requires a serious and deliberate mind; to create a binding agreement there must be intent to bind his own will for the benefit of another. In consensual or real contracts the reasonable cause consisted in the serious and deliberate intention of entering into the contract with its consequences. In *donatio* the mere desire of liberality was enough to raise obligation. Reasonable cause includes the consideration of English Law; it must not be pepper-corn consideration⁴.

¹ Voet 45, 1, 3.

² 1841, 2 Menzies. 59.

³ 1841, 2 Menz. Rep. 218, 221.

⁴ *Rood v. Wallach* 1904, T.B. 201, Per Rose-Innes, C. J.

In *Mtembu v. Webster*¹ Villiers, C. J., said: "A purely nominal consideration would not be regarded in our courts as a reasonable cause." These two cases show that the law requires cause to be reasonable. Maasdorp² writes: "The test as regards the cause of an agreement is not so much whether it amounts to consideration but whether it is reasonable." In consensual contracts, Roman-Dutch Law agrees with Roman Law up to this point; both require certain essential points of agreement to be present; in each system some reasonable cause must be present to create a binding obligation, *e.g.*, a contract of sale requires agreement as to the thing to be sold and price to be paid, though neither the thing nor the price is paid. Voet³ writes: "Consent is necessary to a purchase conformably with the common nature of all contracts; no one can be compelled to buy or sell against his will; or in contract of letting and hiring as to the thing or services to be let, and the rent, hire or wages to be paid for the same."

There is some disagreement with the above view. The Chief Justice of Cape Colony holds a different view from the Judge President of the Eastern Districts Court and the Judges of the Supreme Court of the Transvaal as to the meaning of the words 'reasonable cause.'

The Chief Justice of Cape Colony is of opinion that Reasonable Cause and Consideration mean practically the same thing; while the Judge President of the Eastern Districts and the Judges of the Supreme Court of the Transvaal hold that Reasonable Cause and Consideration are quite distinct in meaning. In Cape Colony Sir Henry de Villiers, C. J., decided that Reasonable Cause and Consideration were identical⁴.

The contract consisted in a promise by the defendant that in the event of his wishing to sell a certain farm, then owned by him, he would give the plaintiff

¹21 S. C. 340.

³18, 1, 3.

²*Law of Obligations*, Vol. III, p. 37.

⁴*Mtembu v. Webster*, 21st June, 1904.

first refusal of it. The defendant afterwards sold that very farm to another for £500, without giving the plaintiff the refusal. The plaintiff sued the defendant for breach of contract. The Chief Justice decided that as there was no Consideration to keep the offer open the contract was not binding. In support of this view he gave the following reasons :—

Roman-Dutch jurists understood *nudum pactum* in a different sense from that of Roman Law. The mistake was due to a passage in the *Digest* (2, 14, 7, 4). Vinnius in his book on *Pacts* (5. 15) says that *nudum pactum* does not mean an agreement not founded on *causa*. The word *causa* was used in a sense as near as possible to the Consideration of English Law because in Roman Law *stipulatio* as a solemn form afforded a ground of action, but in *practice* if it was not formed on *causa*, the judgment could be averted by *exceptio doli*. Dutch Law removed these subtleties of Roman Law in regard to *pacta* but continued to insist on *causa* as to every actionable agreement; and the Dutch Courts in actual practice only admitted as a valid *causa* for contracts other than donation, such a *quid pro quo* as Consideration in English Law. Van Damhouder (1507—1581)¹ says, “ Writings containing an obligation without a cause (*oorzaak*) are in law of no force, or at all events of little effect, and consequently have no binding force. And obligations are understood to have no cause if the wherefore (*waaromme*) of the obligation is not therein expressed.” To illustrate the meaning of *waaromme* he adds : “ Whether it arises out of a loan or a purchase or other similar causes.” Groenewegan (1613—1652) approves of this statement, but he adds, that the *causa* need not be expressed in those cases in which from the relationship between the parties, the existence of a *causa* may be presumed, “ as, for instance, if a merchant has given a bond without a *causa* expressed to a merchant, a scholar to his teacher, a patient to his physician or a wounded man to his surgeon.” Van Leeuwen² says

¹*Practice in Civil Cases*, ch. 175,

²*Censura Forensis*, Pt. 1, Bk. 4, ch. 2, sec. 2.

nudum pactum, however seriously and deliberately made, does not give rise to an action. "Hence," he adds, "the maxim *ex nudo pacto non oritur actio*; and this has been received in our practice according to which even a bond which contains no *causa debiti* is of no effect, nor can an action be brought thereon unless the *causa* is proved *aliunde*." Voet (2, 14, 9) admits that the *causa debiti* must be expressed, or at least proved, and this admission shows that the existence of *causa* is essential to the validity of the debt. Sir Henry de Villiers, C. J., prefers the view of Van Leeuwen to the view of Voet, because the Privy Council in L. R. 4 P. C. 255 declared the *Censura Forensis* of high authority and Van Leeuwen, being the Registrar of the Supreme Court of Holland, had more opportunities to know the actual practice than Voet who lectured at Leyden in the Academy. Voet cites the case of the Deacons of the Walloon Church at Amsterdam *v. De Willem*¹ as authority to show that every agreement seriously and deliberately entered into is enforceable by action (2 14, 9). Two Amsterdam merchants agreed to refer a dispute to arbitration and to abide by the award and not to appeal to a tribunal; and if either party broke that promise, he should pay a penalty of £100 to the poor of the Walloon Church. After the award was made one of the parties did apply to Court to set it aside. The deacons of the Church sued the party who broke that agreement. The Court of Appeal held the action would be allowed. *Tradesmen's Society v. du Preez*² was similar in facts and the action was allowed. But this case cannot be an authority to prove that if there were no valuable consideration such a promise would have been binding in the Dutch Supreme Court. The promises were mutual and the only reasonable cause for the defendant's promise was the promise made by the other party to the agreement that he would pay a penalty to the plaintiff in the event of the undertaking being broken. Urich Huber

¹Coren's *Observations* 13
Num. 8, 9 and 10.

²5 S. C. 169.

(1636-94)¹ says the practice mentioned by Van Leeuwen was not confined to bonds and other written obligations but was extended to other contracts. Huber says "All promises must have an *oorzaak* and without it they can have no effect; it must be observed that in a written promise the *oorzaak* must be expressed, although if not expressed it may be proved *aliunde*; otherwise a writing that he owes something and promises to pay it without the *oorzaak* for debt appearing has no force and it was held in *Sybrandt v. Poppes* (decided in 1680) that the Court could not enforce a written acknowledgment of debt for 415 guildens without any more appearing." Villiers, C. J., is of opinion that in practice the Courts did require more than a sufficient reason such as *quid pro quo* or gift. *Causa* did not clearly express what the word *oorzaak* means in the Dutch language, as used in the expression *redelyke oorzaak* by writers like Grotius and Graenewegen use, or *justa causa debiti*, as Van der Keessel has it. But on the other hand *redelyke oorzaak* means valuable consideration.

In *Rood v. Wallach*² the Supreme Court of the Transvaal held exactly the opposite of what the Supreme Court of Cape Colony decided in *Mtembu v. Webster* on 31st March, 1904³.

These cases have raised a doubt as to the true view of the doctrine. From the authority of Dutch jurists it is impossible to escape from the conclusion that reasonable cause, as used in their writings, cannot be identified with the doctrine of *quid pro quo* of English Law; the view as advocated by the Chief Justice of the Supreme Court of Cape Colony seems to ignore the spirit and teaching of Roman-Dutch jurisprudence. It is an attempt to graft the Doctrine of Consideration on an alien system of jurisprudence, without introducing

¹In his Treatise *Hedendaagsche Rechesgeleerdheid*, Bk. III, ch. 21, 6 and 7.

³S. A. L. J. (1907), p. 907, discusses the meaning of the reasonable cause of Grotius.

²Decided 31st March, 1904.

all the surrounding circumstances round which it has grown ; it is, according to the humble opinion of the writer, an attempt to subvert by judicial decisions the well established and accepted view that Roman-Dutch Law should prevail in this colony. The grounds for such a drastic change do not exist, but on the contrary there are powerful reasons for applying the Roman-Dutch Law as contained in the works of eminent writers.

(1) Voet¹ says division of contracts in Roman Law is not accepted in Roman-Dutch Law; *nuda pacta* entered into with serious and deliberate intention give rise to action in Roman-Dutch Law ; it does not matter whether that promise was given at the same time of such contracts or afterwards.

(2) Grotius² says the German principle and practice is that all promises which result from a reasonable cause, in whatever terms expressed, and whether the parties were together at the same place or not, conferred a right to claim or reject a claim.

(3) Vinnius³ says : " An action is allowed, even upon a nude and simple pact, so that a pact has the same force as a stipulation."

(4) Graenewegen⁴ says : " An action is allowed upon a *nudum pactum* and an obligation is acquired for another by *stipulatio* ; by our customs an exception as well as action will lie upon a *nudum pactum*."

(5) Huber⁵ says : " All promises must have a cause (*oorzaak*) and without it they cannot have any effect."

(6) Dekker⁶ says : " In the law of Holland we have merely to consider : (i) whether the persons were capable of binding themselves ; (ii) whether the agreement was made deliberately and voluntarily ; (iii) whether it has a physical and moral possibility or reasonable cause."

¹Voet, *Commentary on Pandects*, written in 1698, 12, 1, 3.

²III, 1, 52.

³*Inst.* 3, 14, 2, sec. II.

⁴*De Leg. Inst.* 3, 21, 19 n 5.

⁵*Heden Rechts*, 3, 21, 6.

⁶See note in Kotze's trans. of Van Leeuwen's *Commentary of Roman-Dutch Law*, p. 10.

(7) Van der Keessel¹ says : " A promise which has no reasonable cause of obligation (*justa causa debendi*) underlying it produces no efficacious action in court, although otherwise a right of action is produced by a *nudum pactum*."

(8) Van der Linden says : " Besides the invalidity of contracts on the grounds of the absence of free consent, they are also null and void whenever they have no cause (*oorzaak*) at all, or a false cause or a cause which offends against justice, good faith or good morals." Van der Linden² says : " The Roman law, and the subtleties of Roman law, are not followed ; a *nudum pactum* according to modern law produces action as well as exception."

In *Mtembu v. Webster*, 21 S. C., 328, the court belittled the authority of Decker, who is called a theorist and a follower of the authority of Van Leeuwen.

Voet says : " Simon Van Leeuwen was wrong when he wrote that *nudum pactum* would not give rise to action in Roman-Dutch law because he confuses *nuda pacta* with an agreement or written acknowledgment of debt in which the *causa debiti* is not set forth. *Causa debiti* must be either expressed or proved in order to determine the amount to be paid."

Sir Henry de Villiers C. J., Sir James Rose Innes C. J. and the Hon. Mr. Justice Kotze agree with Voet's authority and follow the authorities given above in the following cases : *Mtembu v. Webster*³ ; *Rood v. Wallach* (1904), T. S. 198 (Kotze's note is quoted) ; *Malan and Van der Merlue v. Secretary* (Foord 97).

In *Mtembu v. Webster*⁴ de Villiers C. J. said : " Voet correctly points out that Van Leeuwen fell into error in confounding *nuda pacta* with conventions which have no express *causa debiti*." In *Louisa and Protector of Slaves v. Van der Berg*⁵ and *Jacobson v.*

¹*Thesis*, 484.

²Note to Pothier on
Obligation.

³21 S. C. 326.

⁴*Ibid.*

⁵1 Mentz, 472.

Norton¹ the Court held that *nuda pacta* gave a ground of action. In *Alexander v. Perry*² the Chief Justice laid down the dictum that consideration in the sense of English law was required to support an agreement. Hence the difficulty about cause oorzaak and consideration in Roman-Dutch law is to be traced to that dictum in 1874. In *Malan and Van der Merve v. Secreta Boon and Co.*³ reasonable cause and consideration existed. The action was upon an agreement between the debtor to pay and the creditor to accept five shillings in the pound in settlement of a debt due by the debtor to the creditor. The dictum in *Alexander v. Perry* was explained. In *Van Beuge v. Coetzee* N. O. and Coetzee⁴ the rule that *nudum pactum* will give a right of action was applied in the South African Republic. Kotze writes: "Until the legislature steps in and makes the necessary alteration, the judges must administer the existing law and not alter or mould it." The Eastern District courts have followed the decision in *Alexander v. Perry*⁵. In *Tradesmen's Benefit Society v. Du Preez* the Chief Justice⁶ said owing to the conflicting meanings attached to the term just or reasonable cause by Roman-Dutch writer the court was justified in giving it a meaning which identified it with consideration of English law and in adopting the rule that there is no just cause for a promise unless the promisee does something which entails on him some detriment or inconvenience, or from which the promisor derives some advantage or benefit. The other judges did not express their opinion on this question.

In *Rood v. Wallach* (1904) T. S. 187, the Supreme Court of the Transvaal has followed the Roman-Dutch view of reasonable cause; and consideration in the sense of English law is not required to make an agreement binding. In *Joubert v. Enslin*⁷ the point was

¹2 Mentz, 221.

²1874 Buch, p. 52.

³Foord, 94.

⁴I. Official Report, 314.

⁵1874, Buch, p. 59.

⁶(1868) 5 S. C. 276.

⁷1910, Appellate Division, p. 6.

raised but was left undecided. In *Mtembu v. Webster*¹ the Court of Cape Colony decided that the only cause which was present was the desire of the promisor to escape from the importunity of the promisee without rudeness and this was not sufficient cause. The remarks of Vinnius² are to the point where a man speaks a thing not with intention or seriously but merely for the sake of saying something, it will not be a reasonable cause.

"In the laws of Ceylon" says Pareira : "Most of the Ceylon. decisions have proceeded on the assumption that a nude pact was insufficient to support an action under the Roman-Dutch law ; but whether this assumption is justified by the authorities has not so far been seriously considered in Ceylon³." The question was raised in case No. 33605 C. R. Negambo 3 S. C. 70, but the point was not decided. In *Lipton v. Buchanan*⁴ the point was decided finally that action will be allowed on a nude pact.

In British Guiana⁵ the same view is accepted. The British Guiana. remarks of De Villiers C. J. in *Mtembu v. Webster*⁶ are to the point : "It is a very good argument to uphold the customs of the country and the practice of the court must be followed."

It will be seen that the current of decisions is in favour of the Roman-Dutch jurists. It is very important to know what Sir Henry de Villiers proposes it should take the place of the English Doctrine of Consideration in the law of contract in South Africa. The point is whether to make a contract binding, the law should require either : (1) reasonable cause ; or (2) serious and deliberate intention ; or (3) both reasonable cause and serious intention in Roman-Dutch jurisprudence. The Point at Issue.

¹ 1904, 21 S. C. 323, 338.

² *Inst.* 3, 14, sec. 11.

³ *Laws of Ceylon*, Vol. II, p. 478.

⁴ 52 S. A. L. J. 19

⁵ 21 S. A. L. J. 247

⁶ 21 S. C. 343.

According to Grotius a promise made for any reasonable cause (*redelyke oorzaak*) is quite sufficient to give a right of action and of *exceptio*; and reasonable cause is present when a promise is made with the object of a gift or is auxiliary to some other transaction, whether it is made at the time of such transaction or afterwards. Massdorp¹ says, Grotius refers here, like Voet (2. 14. 9) to the *pacta adjecta* of Roman law and in the same terms. According to Latin authorities, serious and deliberate intention is required and nothing is said about reasonable cause. Vinnius and Voet insist on the serious and deliberate intention of the parties to create a contract. Massdorp requires both reasonable cause and serious intention to make a contract binding. "Reasonable cause," according to him, "means an agreement which is entered into with a serious and deliberate mind from some reason or cause which induced the person entering into it to bind his own will for the benefit of another²." According to Vinnius and Voet, it is quite sufficient if the parties seriously thought of producing a legal effect, but in South Africa that will not be sufficient to produce liability, unless there is in addition a reasonable cause or motive falling short of liberality. This does not apply to donation and consensual contracts, because in consensual contract both serious intention and reasonable cause are to be found and in donation the donor desires to show his liberality towards the donee. In *Mtembu v. Webster*³ the court treated the pepper corn consideration as purely nominal; it was not equivalent to reasonable cause. The test seems to be whether the cause of an agreement is reasonable. To be legally binding Roman-Dutch law must have the following elements: (a) seriousness; (b) lawfulness; and (c) reasonableness; the court has to determine the question of the reasonableness of agreement in each case.

¹*Law of Obligations*, Vol. III, p. 39n.

²*Ibid*, p. 36.

³1904, 21 S. A. L. J.

A.—RULES OF THE DOCTRINE OF “ CAUSE ” IN THE LAW OF CONTRACT.

RULE I.—A “ Cause ” is necessary to make binding contract.

Cause is the object which a person acting has in view. In *Lipton v. Buchanan*, the Court of Appeal decided that the lower court was wrong in holding that the agreement to pay a debt was governed by English law. The defendants, Buchanan and Fraser, carried on business in partnership under the name of Buchanan, Fraser and Co., until 1896, when the partnership was dissolved by a decree of the District Court which appointed a receiver of the partnership business. The partnership had incurred debts to the plaintiff and Fraser. Defendant paid half the debt on account of his indebtedness and the plaintiff released him from liability as was shown from the letter written. He sued him and his partner for the rest of the debt. The lower court decided:—(1) that the agreement was governed by English law and was inoperative owing to want of consideration. (2) Even if Roman-Dutch law applied, it was inoperative owing to want of consideration. In the Appeal Court of Ceylon, Wendt and Middleton JJ. held that the lower court was wrong. Wendt J. said: “ The maxim of Roman law *ex nudo pacto non oritur actio* did not prevail in Roman-Dutch law.”

Kotze¹ thus discusses this point: “ In the present case there was a lawful cause for the agreement. The creditor recognised that although the entire debt might be exigible from either partner, yet between themselves each was liable for one-half only. A receiver was in possession of the firm's assets. The defendant paid half the debt, presumably saving the plaintiff further delay and trouble, and the plaintiff promised in return not to proceed against Fraser for the balance until Buchanan had been completely excused. It may be that according to English law

¹ Note to Van Leeuwen's *Commentary*, Vol. II., p. 28.

there was no consideration for this promise, but according to Roman-Dutch law it was supported by a sufficient cause.

Middleton J. agreed with Justice Wendt and added : " The District Judge of Colombo was wrong in applying the English Doctrine of Consideration " and favoured the application of Roman-Dutch law. Hutchinson C. J. agreed also.

Cause in
Negotiable
Instruments.

English and Roman-Dutch law have sprung from the same source. The difference is in details and not in principle. English Bills of Exchange were introduced into Natal in 1887, and into Cape Colony in 1893, and Cape law on the subject was taken over by the Transvaal by Proclamation No. 11 of 1902. There are differences in the subject of consideration. In English Bills of Exchange : (a) any consideration is sufficient to support a simple contract ; or (b) an antecedent debt or liability. In the Cape Colony Transvaal laws (sec. 25), consideration is defined as any cause sufficient to support an action founded on contract or agreement. An antecedent debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time. In the Natal Act valuable consideration is not necessary to entitle the holder to sue therefor, and the word cause is not mentioned.

In Cape Colony *causa* and consideration mean the same thing ; in the Transvaal it is not so. Thus a bill which cannot be sued upon in England is valid in the Transvaal.

The English Bills of Exchange Act (sec. 54) enacts that where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course¹. Such an instrument is termed *aval*, which is said by Lord Blackburn to be an antiquated term signifying undertaking. According to Pothier an *aval* may be either on the bill

¹Cf. Cape and Transvaal Laws, sec. 54.

itself or on a separate paper, and if such an *aval* was given by anyone, his obligation to all subsequent holders of the bill was precisely the same as that of the person to whose transfer the *aval* was given, and under whose signature it was written. English law does not go so far.

The question of the negotiability of debentures to bearers arose in the *African Banking Corporation v. the Official Liquidator of Grand Junction Railway, Ltd.*, in 1907, in Cape Colony. The debentures in question were made payable to bearer covered by bond. The Cape Colony Act (No. 43 of 1895) does not clearly state that debentures payable to bearer are negotiable instruments, but it endows them with some qualities peculiar to negotiable instruments. Sir Henry de Villier decided that such debentures to bearer are recognised as negotiable instruments. This was so decided as a matter of law without evidence of custom being given. In England debentures to bearer are regarded as negotiable instruments also.

A *bona fide* holder of a negotiable instrument gets an indefeasible title by delivery¹.

RULE II.—A cause consists in deliberate agreement between the parties to it for a reasonable ground.

It has nothing to do with the promisor deriving any benefit from the promise or the promisee suffering from any detriment. In this sense it is quite distinct from the English meaning of consideration. It is distinct from the *causa* of Roman law and no legal form is to be observed as in formal contracts; the distinction between different kinds of contracts and pacts, which obtains in Roman law, is not to be found in Roman-Dutch law.

The division of Roman contracts into real, verbal, literal and consensual does not obtain in Roman-Dutch

¹Woodhead Plant and Co. v. Cunn, 11 S. C. 4.

law because all contracts are consensual. Also the division of contracts strictly *juris* and contracts *bonae fidei* is not kept in Roman-Dutch law because all contracts are *bonae fidei*; the division of contracts into nominate and innominate is not kept.

The test in Roman-Dutch law as regards the cause of an agreement is whether it is serious and reasonable.

The division of simple contracts and contracts under seal in English law is not to be found in Roman-Dutch law; and deeds are not binding by their solemnity, there must be serious and reasonable cause in all contracts, whether under deed or not.

In Roman-Dutch law an action is allowed for misfeasance as well as for non-feasance; in mandate one person agrees with another to entrust the doing of some act and that other (mandatory) gratuitously agrees to perform it. The contract is complete as soon as consent is given. Action will lie for non-performance. In Cape Colony in *Colonial Secretary v. Davidson*¹ it was decided that where a person undertakes a gratuitous mandate, he cannot be allowed to set up want of consideration as a defence for misfeasance. Sir Henry de Villiers leaves the point open whether for want of consideration an action will lie in case of non-feasance. Voet² says in a mandate there may be a promise of remuneration and as such if it were definite it could be sued upon, though not in the ordinary action of mandate.

RULE III.—As a rule, a contract affects the parties to it and no others.

Van der Linden says the rule of Roman-Dutch law that only that which one of the contracting parties stipulates for himself, as also only that which the other party promises for *himself*, can be the subject of a

¹(1877) 6 Buch, 131.

²17, 1, 2.

contract, "while to stipulate for anything or accept anything for a third party is void except the third party has afterwards ratified the promise and thereby obtained a right¹." Grotius says no one can make a promise which is binding on another beyond the exceptions given. If anyone not within those exceptions promises that a third person shall do or give something, it is understood by us as a promise on his part to cause the same to take place². A person may also stipulate or accept a promise whereby something is promised to be given to him or to a third person, in which case the promisor has his election to whom he will pay; although the third person may not claim because in general no one acquires a *jus in personam* by means of another; but if a promise were made to pay something to the acceptor and to a third person then the acceptor would have a right to the half³. Van Leeuwen⁴ says in an obligation by contract we can bind no one but ourselves and our heirs and by no means a third party with respect to whom such obligation would be ineffectual. "As we cannot stipulate in favour of a third party," he writes, "so we cannot bind any third party by any transaction." Vinnius, Voet and Graenewegen are, on the contrary, in favour of the validity of such agreements. Kotze in his note writes: "It accords with our laws and customs that we may stipulate for something in favour of a third person and actually bind another thereto, for stipulations have not been introduced amongst us as with the Romans solely for the purpose of merely acquiring something for oneself but also to promote the interest of a third person, if only the third person approves the stipulation, but a stipulation to the prejudice of a third person will not, just as among the Romans, hold good." Pothier⁵ is of the same opinion: "When I stipulate with you for a third person, the agreement

¹ *Inst.*, 1, 14, 3.

² *Intro.*, 3, 33.

³ *Inst.*, 3, 3, 37.

⁴ *Roman-Dutch Law*, sec. 4.

⁵ *Obligations*, sec. 54.

is void, for by this agreement you do not contract any obligation in favour of such third person or myself. It is evident that you do not contract in favour of the third person; for it is a principle that agreements can have no effect except between the contracting parties, and consequently that they cannot give any right to a third person who is not a party to them. By this agreement you do not contract any civil obligation in my favour."

Graenewegen¹ and Voet² think the rule is now obsolete. Van der Linden says: (a) I may stipulate that payment instead of being made to me, be made to a third party; or (b) I may stipulate that a person may do something for a third party, if I have a direct interest in the act; or (c) I cannot prevent stipulating or promising on behalf of an heir or assignee; (d) or prevent contracting through the intervention of a third party, *e.g.*, through an agent.³ In *Wright v. Williams*,⁴ Sir Henry de Villiers said, the agent in Roman Law was not regarded as a mere representative for the purpose of entering into contract for his principal. The person contracting with him might elect to sue either of them. In Roman-Dutch Law the change was gradual. Voet offers no opinion. The better opinion was that the principal alone was liable except in certain cases. In South Africa the English Law of agency is taken over without technical rules. *Otto v. Vanderplank*⁵, the Natal Supreme Courts decided that a contract in favour of a third person is valid if it is accepted by him. De Villiers, C.J., decided⁶ that natural love and affection is no ground to allow a third party who was not a party to the contract to enforce it.

¹ *Ad Inst.*, 3, 20, 19.

² 45, 1, 5.

³ 22 S. A. L. J. 85.

⁴ 8 S. C. 166.

⁵ Oct. 23, 24, Dec 16, 1911.

⁶ *Tradesmen's Benefit Society v. Du Preez*, 5 S. C. 269.

RULE IV.—The cause must be genuine and not illusory. A contract can be set aside on the ground of inadequacy of value.

A contract can be rescinded if the party suffers loss to the extent of more than one-half of the value of the subject-matter of the contract. This rule also applies if the buyer has paid more than double the value of the thing sold.

In Roman Law the seller could rescind the contract on the ground of the price being less than half the value¹. Grotius² says: "Relief on account of damage exceeding the half is classed by us under the remedies whereby a contract is not invalidated altogether but in part; because it is at the option of the opposite party to abandon the whole contract or compensate the damage." If the reason of the principle of contracts is examined, it is manifest that they have derived their origin from a mutual abundance and deficiency. It was first resolved that the seller who had stipulated for less than half the real value of the property sold, such as it was at the time of the sale, might call upon the purchaser to annul the purchase or restore to the other party what had been received, or at least to make good the deficiency in the real value; it was gradually extended to purchasers who had paid more than double the value of the property and therefore had received articles for less than half the value; and afterwards this principle was extended to letting, hiring, compromise, partition and all other contracts except sales under judicial authority or those which were directed by last will or in case of donation. The half value is to be measured from the time of the contract. Van Leeuwen³ says: "The whole transaction is not void; it is voidable at the option of the aggrieved party and the purchaser has the option to pay up the difference." In *Levisohn v. Williams*⁴, L. sued W. for £45, the price

¹Code 44.

²Introduction, 3, 52, 1, 2.

³Commentary, 4, 20, 5.

⁴1875, Buch. Rep. 108.

of a diamond ring, which was worth not more than £20. Held, the defendant can be relieved. In South Africa the tendency is to restrict the operation of this rule of the inadequacy of consideration¹. If the contract relates to the future sale of a thing, such as next season's crop, this rule will not apply. In English Law the inadequacy of consideration is never a ground to rescind a contract. In *Raleigh v. Jasmins*, a jewel worth about £50 was sold for £100. The purchaser asked for rescission of the sale. In Cape Colony the doctrine is repealed. Swan, Acting J., said: "I have been unable to find any local instances of action for rescission of contract on the ground of inadequacy, nor have I been able to discover anything to show that such actions may be brought in Courts of this Colony." The Act 8 of 1879 (sec. 8) in Cape Colony enacted that no contract should be void or voidable owing to *laesio enormis* merely by either party to such contract.

In Roman-Dutch Law the contract can be set aside on the ground of *laesio enormis*², but by express legislation this rule is abolished in Cape Colony³ and in the Orange Free State by Proclamation (1902, sec. 6). This rule still prevails in the Transvaal.

RULE V.—The cause of the promise must be definite, possible, and legal, and not opposed to public policy.

The heads of illegality are the same both in Roman-Dutch and English Law.

The Perpetual Edict of 4th Oct., 1540⁴, enacts that no merchant, tradesman or other person may make contracts of the nature of monopoly or prejudicial to the public welfare; *e.g.*, to buy up all goods of a certain kind in order to sell at an exorbitant price.

¹ *McGee v. Mignon* (1903), T. 8. 89.

² *Cod.* 4, 44, 2.

³ Act 8, see *supra*.

⁴ G. P. B., Vol. I., p. 311, Art. 7.

An agreement for compound interest is not unlawful¹. The Cape Parliament has passed a Usury Act (No. 23 of 1908) by which the rate of interest is fixed. The Act does not apply to mercantile transactions between merchants.

Contracts are not only invalid on account of absence of free consent, but they are also void when made without any *causa* or on a false *causa* or on a *causa* which is contrary to justice and *bona fides*.

An act contrary to law or good morals is regarded as impossible. The definite act must be promised and that act must be capable of being valued. Contracts of wagers are void. No action lies on gambling though a bond may have been given in consequence. No debts can be recovered for drinking bouts. The new Statutes of Leyden of 1583 (sec. 130) declare that no action will lie on gambling debts.

Agreements relating to future right of succession, or binding the testators not to dispose of property contrary to agreement, are unlawful². Marriage brokerage contracts are illegal³.

The law about gaming contracts is discussed in S. A. L. J., Vol. XXIII, p. 21. The tendency is to follow English cases. Cape Colony Act, No. 36 of 1902, reproduces the Gaming Act of 1845 (8 and 9 Vict., c. 109).

If money is paid under a mistake, it can be recovered in Roman-Dutch Law. In English and Roman-Dutch Law money paid under a mistake of fact can be recovered. In English Law money paid under mistake of law cannot be recovered. In Roman-Dutch Law there is a difference of opinion among jurists on this point. Grotius⁴ says: "If he did the same knowingly, the act would be considered as a donation⁵, but whoever is in error or in doubt is considered as being ignorant

¹ Voet. 22, 1, 20.

² Van der Keessel, *Thesis*,

³ Gro. 3, 1, 42; Voet 2, 14, p. 482.

⁴ *Introduction* 3, 30, 6.

even had it been an error or doubt as to the law." Van der Keessel¹ says, "The *condictio indebiti* or action to reclaim is not maintainable for a sum paid under a mistake of law; and it cannot be proved that a contrary rule has been adopted in the practice of the Court; yet the reason of the law of Holland seems to require that a *condictio indebiti* should be allowed even in the case of a mistake of law." Voet (12, 6, 7) holds a contrary view. In *Port Elizabeth Divisional Council v. Uitembage Divisional Council*², Connor J. said: "To recover money on mistake of law the plaintiff must show natural equity on his side."

Sale in Market
overt.

The Transvaal Court, in *Retief v. Rammerstack*³, decided that the rule of Roman-Dutch Law was that stolen goods sold in market overt could not be reclaimed except after tendering the price paid for them. In *Van der Merwe v. Webb*⁴ a different rule was adopted, and Sir Henry de Villiers, C. J., approved *Woodhead Plant Co. v. Gunn*⁵. He said markets overt never existed and do not exist in South Africa similar to *vrije markten* of the Netherlands. In *Retief v. Rammerstack* the Supreme Court of the Transvaal, consisting of Kotze, C. J., Burgers and Brane, J. J., dissented from the judgment in *Merwe v. Webb*, but held that the rule in favour of a sale in market overt or in a public place did not extend to the purchase of stolen property at an auction⁶.

In leases a lessee could resist a claim for rent on the ground that, owing to causes over which he had no control, he was unable to make a profit of the land according to Roman Law. Cape Act No. 8 of 1879 (sec. 7) enacted that in the absence of stipulation to the contrary contained in contract of lease, no lease should be void or voidable nor should the rent accruing under lease be incapable of being recovered on the ground

¹ *Select Thesis*, 796.

² 8 Buch. 221.

³ 1 C. L. J. 346.

⁴ 3 E. D. C. 97.

⁵ 11 S. C. 4.

⁶ Van Leeuwen, *Roman-Dutch Law*, Bk. 11, ch. 7, sec. 3.

that the property, owing to inundation, tempest or such like unavoidable misfortune, produced nothing. Thus English Law and the Law of Cape Colony are similar on this subject.

Whatever has been given for an unlawful or otherwise immoral purpose may be demanded back. The winner in gambling or gaming cannot lawfully recover the promised gain¹. On this point English Law is similar. In *Dodd v. Hadley*, August 1905, the Supreme Court of the Transvaal decided that the Roman-Dutch Law appears to have been substantially the same as English Law with regard to gaming contracts. The facts were that Dodd staked a sum of money with a bookmaker to abide the result of a horse race and subsequently received the proceeds of wager on behalf of Hadley. *D* sued for the money advanced. *H* claimed the money which he had received for him. *H* argued that the contract being *contre mores* was illegal and relied on *Grant v. Collect*, decided by the Natal Court. *D* replied that the case was not applicable; by Roman-Dutch Law wager was not illegal but unenforceable². Sir James Rose Innes, C. J., said: "English and Roman-Dutch Law have substantially the same provision," and Hadley was entitled to recover the amount from Dodd.

RULE VI.—A mere motive to return a benefit already rendered is regarded as a reasonable cause.

The term reasonable cause is wider than consideration in English Law; it denotes the ground, reason, cause, *causa*, object of a promise which the law can enforce. It is equivalent to physical and moral possibility; moral possibility means not contrary to good morals. Pothier³ says in contracts of beneficence, the liberality which one of the parties intends to

¹ *Sonnenberg v. Flower*, Buch. (1875), p. 4.

² Van Leeuwen's *Commentaries*, Vol. II, Bk. 4, ch. 14,

sec. 5; Grotius 3. 3. 49: Van der Linden 2. 6. 7.

³ P. 1, C. 1, sec. 6.

exercise towards the other is a sufficient cause for the engagement contracted in his favour. The word *oorzaak* or *causa* denotes both consideration and motive or reason for the promise and moral consideration.

In English Law motive is not the same thing as consideration; nor can moral consideration give a right of action unless a legal right existed.

RULE VII.—The abandonment of a legal right, or a *bona fide* claim, is binding.

The payment of a smaller sum is a satisfaction of a larger sum at the same time and place because release of the debtor may be effected by bare agreement¹. Composition with creditors is binding. In English Law release from liability is not binding without consideration or unless it be by deed². In Cape Colony, where the English Doctrine of Consideration is recognised, consideration is necessary for release³. Release may be in any form in Roman-Dutch Law. In Roman Law a contract was to be dissolved by the same formalities as those by which it was formed. Grotius (3, 41; 7) says: "Amongst the Romans a release by donation was usually effected by certain words. But with us it is sufficient to make use of such words as will convey abandonment of one's rights."

RULE VIII.—A compromise in a *bona fide* dispute is a reasonable cause.

This is also the rule of English Law. Each party gives up what he regards to be his right of action. It constitutes a reasonable cause. There must be a serious and deliberate intent to give up a right by compromise: it must be honest and fair dealing.

¹Grot. 3. 41. 5, 6.

²Pinnel's case 1602, 5 Coke Rep. 117.

³Malan and Van der Merwe v. Secretan Boon and Co., Ford's Rep. 94.

RULE IX.—An antecedent act gives rise to liability which can be enforced by action.

The peculiar rule of English law that consideration may be present or future but must not be past has no place in Roman-Dutch jurisprudence because it has a simple rule in every case for creating contractual liability. The rule is that there must be a serious and deliberate intention to create contractual obligation, and moral obligation is as binding at law as in conscience. Nor must the natural obligation of Roman law amount to *pacta legitima* because the pacts give a right of action as well as of exception in Roman-Dutch law.

RULE X.—A promise, on the part of a third party to give something on a marriage taking place, is binding.

Under Roman-Dutch law betrothal involves a legal obligation to marry, the breach of which gives rise to an action of damages. Before 1838 the injured party could claim either damages or specific performance, but the latter remedy is abolished by Order in Council, of 7th September 1838. In Ceylon action for damages is allowed by Ordinance No. 6 of 1849 (sec. 30). Ordinance No. 2 of 1895 (sec. 21) enacts that no action shall lie for the recovery of damages for breach of promise of marriage unless such promise of marriage shall have been in writing. Betrothal consisted in a promise on the part of the father or guardian to hand over the bride at a future date. It was a public act. Roman-Dutch law has abandoned the Teutonic custom to grant specific performance, but, like English and Roman law, allows damages to the rejected party. There is sufficient cause in a contract to marry. The promise of one party is sufficient cause for the promise of the other.

Maasdorp regards marriage as a civil contract¹ while Van der Linden denies that marriage is a civil contract at all either in Roman or in Roman-Dutch law. Watermeyer J. in *Brown v. Brown's Executors*² discussed the point whether damages should be granted on breach of promise of marriage or not.

RULE XI.—There is no instrument in the nature of a deed and cause is required to make it binding.

In Roman-Dutch law there is no instrument in the nature of a deed, because all promises founded on reasonable cause, in whatever form of words, whether the parties were near or distant, gave right of action or defence. There are some contracts which must be made before a notary. Deed in Roman-Dutch law means notarial deed, drawn up and sealed by a notary, and no delivery is requisite to its validity. In English law delivery of the deed is essential. Contracts relating to land or marriage settlement must be made by notary. A deed does not work merger; nor does it create an estoppel. It only means a solemn act in writing.

B.—THE DOCTRINE AS IT AFFECTS LAW OF PROPERTY AND CONVEYANCE.

RULE I.—The presence or absence of reasonable cause affects the legal character of the transaction.

In Roman-Dutch law a gift is a promise whereby one who is not bound to another binds himself out of liberality to bestow something of his own upon another, without receiving from him anything in return.

In English law a promise to give, unless it be in a deed, cannot be enforced; in Roman-Dutch law a gift is complete without delivery; delivery is necessary to pass ownership. No formality or writing is

¹*Institutes of Cape Law*,
ch. 11.

² 3 Searle, 322.

required. A gift may be made out of gratitude or in return for benefit received in the past. In Roman-Dutch law the donee must accept the gift before it can be complete. In English law acceptance is presumed till the contrary is known. In English law the requisites of gift are the expression of intention to make a gift; and delivery or declaration of trust that the donor holds that thing in trust for donee. A deed has force without acceptance.

In Roman-Dutch law there are restrictions on giving away all the property by way of gift; not so in English law. The restriction is against interference with rights of creditors.

To complete a gift the donee must be informed of the gift being made if the property is given to a third person¹.

In English law if a gift is completed it cannot be revoked, but in Roman-Dutch law it can be revoked under some circumstances, *e.g.*, (1) Gross ingratitude of donee. (2) Where the donor has children born to him after the gift, the children, if prejudiced in their legitimate portion, can claim from donee to that extent. But in South Africa the legitimate portion is abolished and this rule does not apply. Van Leeuwen² defines donation as a voluntary delivery of a certain thing without any *oorzaak* to another.

Roman-Dutch jurisprudence has no idea corresponding to trust in English law.

The alienation of immoveable property must be registered. Charles V. enacted that the parties must go before an officer of the *situs* of property; and if the rule was not complied with the transfer was void. In Roman-Dutch law a complete system of registration prevailed, quite distinct from the *traditio* of Roman law. In *Harris v. Buissinne's Trustee*³, the registration system was introduced into Cape Colony in 1714.

¹De Kock v. Executors of
Van de Walt, 16 S. C., p. 463
per De Villiers, C. J.

²Comm. Bk. 4. ch. 30,
sec. 1.

³3 Benz. 255.

In 1829 a Registrar of Deeds was created. All the Colonies of South Africa have adopted this system of land registration; and endorsement upon the register of land is notice to all the world as to the person to whom the ownership of that land belongs.

In Cape Colony a Proclamation of 1793 required an *antenuptial* contract to be registered. In *Steytler v. Deckers*¹ it was decided that all *antenuptial* contracts must be publicly registered in the Debt Register. In 1875 the same was enacted in Cape Colony; sec. 2 provides that no *antenuptial* contract shall be valid or effectual as against any creditor, unless the same shall be registered in the Deeds Registry of the Colony. It is also enacted that no *antenuptial* contract executed in the colony shall be capable of being registered unless notarially executed, though such contracts if executed abroad, need not be notarial. In Cape Colony an *antenuptial* contract must be notarial and must be registered to be of any effect against third parties. As between the spouses it is valid, even though the contract is not registered, and registration can be effected even after marriage². The law in South Africa is similar to that of Cape Colony about the execution of *antenuptial* contracts.

In Roman-Dutch law a promise to make a gift, if it is not completed by transfer of property, must be registered, otherwise creditors can object to donation on the ground that no donation has actually taken place.

RULE II.—A contract or conveyance though valid can be set aside on various grounds if it was made for want of reasonable cause.

An *antenuptial* contract was entered into when property was possessed by both spouses³; otherwise *Communio bonorum* prevailed. Charles V. enacted that wives could not participate in these gifts unless creditors

¹2 Roscoe, p. 103.

²Twentyme v. Rewitt, 1 Menz. 156; in *re* Houghton

15 S. C. 8.

³By Perpetual Edict, 1540.

were paid in full or unless the marriage gift came from the wife alone. In *South Africa Bank v. Chiappini*¹ this rule was acted on. The Cape legislature of 1875 enacted that no *antenuptial* contract should be valid : (a) Unless it was registered; (b) if sequestration took place within two years, the creditors were to be preferred to the spouse upon whom the settlement had been made ; (c) if sequestration took place five years after registration, the settlement was unimpeachable; (d) if sequestration took place within five years after registration it could still be impeached if creditors could prove that alienation was made with intent to defraud creditors and when the alienor's liabilities exceeded his assets. The Act also protects settlements by way of life policy. In the Transvaal the spirit of this Act is accepted. Law 13 of 1895 (sec. 39) provides that benefits conferred by *antenuptial* contract are secured to the spouse in whose favour they have been made provided that the donor was not insolvent when the gift was made and that two years have elapsed between the settlement and the insolvency.

In other cases the Insolvent Ordinance of 6th October, 1843, provides that every alienation, transfer, gift, cession or delivery of any goods or effects, moveable or immoveable, made by any insolvent at the time when it shall be made to appear that the liabilities fairly calculated exceeded his assets fairly valued, shall, unless the same shall have been made *bona fide* and upon just and valuable consideration, be null and void. Hence if a gift is completed by transfer it cannot be impeached by creditors unless they can show that the case falls under the Ordinance of October 6th, 1843 (sec. 83).

A purchaser can rescind a contract by *actio de dithoria* if the goods are materially different from what they were represented to be and he has paid more for them than he would if he had known of their defects. This rule does not obtain in Cape Colony but prevails

¹Buch. (1869), p. 143.

in the Transvaal. The seller can also sue in *actio minoris* if the price is less than half the real value. This rule does not prevail in Cape Colony but obtains in the Transvaal. In English law sale cannot be set aside on the ground of inadequacy of price, either by the seller or the buyer.

Under Roman-Dutch law a pledge of moveables without delivery does not avail against a third person who has obtained possession of the goods by sale or execution. If the pledge is by a notarial deed registered in the Registry of Deeds, the pledgee will get preference if the debtor goes insolvent without having parted with possession.

In *Hare v. Trustee of Heath*¹, De Villiers, C. J., held that "A prior bond specially hypothecating land and containing a general clause hypothecating all moveable and immoveable property of the mortgagor is preferred in insolvency upon moveables of the insolvent estate to a subsequent bond hypothecating the same land and also specially hypothecating certain moveables of which no delivery had been made by the insolvent to the mortgagee." *Tatham v. Andree* was decided by the Privy Council in 1863. From the Supreme Court of Ceylon Sir William Rowe, C. J. said, "The law of this Colony as it now stands not only enables a man by retaining possession of his own hypothecated goods to delude the world by the appearance of solvency but also permits any one creditor lying behind and furnished with a notarial deed to come in at the last moment and deprive the general creditors if his specialty debt be large enough." In the law of Holland moveables could be mortgaged by pledge accompanied by delivery or by means of notarial bond without delivery. In Ceylon notarial bonds of moveables, even without registration, are valid as against the insolvent party and concurrent creditors. In the Cape of Good Hope the law follows later Dutch law and gives validity after registration in the Register of Deeds.

¹ 1884, Juta 3, Supreme Court of Good Hope.

In English law the Land Registry Acts (17 and 18 Vict., c. 36) enable any person who may think fit to give credit to another to ascertain whether the latter is really owner of his stock-in-trade or furniture. The Bills of Sale Acts, 1878, 1882, enact that registration must be effected within seven days of execution and reregistered every five years.

Community of goods between spouses exists in Cape Colony in cases where it has not been expressly excluded by *nuptial* contract. In Ceylon, Ordinance 15, of 1876, abolished community of goods.

In British Guiana Act 12, of 1904, abolished community of goods.

Leases of property for ten or more years must be executed judicially before a notary and registered to protect honest purchasers.

In *Canavan and Rivas v. New Transvaal Gold Farms Ltd.*,¹ the Supreme Court of the Transvaal decided that leases for ten years and more must be registered to bind lessor's creditors and innocent purchasers from lessor.

C.—OBLIGATION TO DISCLOSE THE NATURE OF CAUSE.

In Roman-Dutch law there is nothing corresponding to the Statute of Frauds². There are some enactments requiring the contract to be reduced to writing disclosing consideration.

The Transvaal Ordinance No. 20, of 1895, Art. 17, enacts that no property (fixed property) shall be considered to have been legally sold before a proper contract of sale or declaration of sale has been duly signed by both parties.

Contracts relating to land and marriage settlements must be made by a notary.

¹1904, T. S. 136.

²29 ch. II, c. 3.

The Ceylon Ordinance No. 5, of 1852, enacts that the Law of England is to be observed in maritime matters, questions relating to insurance and Bills of Exchange.

The British Guiana Ordinance No. 6, of 1864, enacts that matters relating to ships and property therein and insurance, salvage shall be governed by the Law of England. Other ordinances have introduced Bills of Exchange, etc.

The Ceylon Ordinance No. 11, of 1896, introduces the English Sale of Goods Act, of 1893.

The contract of suretyship need not be in writing.

The Royal Commission appointed in 1879 recommended that in the absence of any law of Holland about mercantile transaction, the courts of the colony are to be guided by the principles of the Law of England.

The writing must contain everything; hence cause or consideration must be fully set out.

CHAPTER IX.

THE ROMAN-DUTCH DOCTRINE OF CAUSA IS ACCEPTED IN THE FOLLOWING BRITISH COLONIES.

British Guiana.—The Common law of this colony is Dutch-Roman law. In 1803 when this place was captured it was provided by the Articles of Capitulation that the settlements of Berlice, Dameirra and Essequibo should be allowed to enjoy their own (Roman-Dutch) law. British Guiana.

By Ordinance English mercantile law was introduced into the colony. The law consists of Regulations, Orders in Council and Acts of Parliament. The English Merchant Shipping Act prevails here by Ordinance No. 6, of 1864.

The Insolvency Act No. 29, of 1900; the Bills of Exchange Act No. 13, of 1891, secs. 27—30 deal with consideration.

Bill of Sale is not recognised in this colony.

By the Bill of Exchange Act No. 13, of 1891 [sec. 27 (1)] valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract; or (b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time.

A mere pledge of moveables, not by public instrument, cannot without actual delivery create a lien.

The Insolvent Debtors' Act No. 29, of 1900, is based on the English Insolvency Act and vitiates transfers made with intent to defraud creditors.

The Gambling Ordinance No. 4, of 1902, enacts that contracts for sale of lottery tickets are void.

*Decairos Brothers & Co. v. Gaspar*¹ following *Rood v. Wallach* decided that the word cause does not mean consideration of English law. The court consisted of Bovell C. J., Lucie Smith and Henrich JJ. They held on evidence that no binding agreement to offer the plaintiff company 'price for price' was ever arrived at. The court added: Nor indeed is valuable consideration always needed². On the evidence, there is cause either of liberality to the plaintiffs or of benefit to himself to show for Gaspar's undertaking to give such a right of refusal.

Ceylon.³

Ceylon.—By Proclamation of 23rd September, 1799, the laws and institutions which subsisted under the late Dutch Government continued in force under British rule. The inhabitants of Kandy are allowed to retain their own laws and customs established among them up to the year 1815. In the absence of any Kandyan law applicable to the case, the general rule is to apply the rules of Roman-Dutch law⁴. The statute law of Ceylon includes Acts of Parliament made applicable to the colony. By the law of Ceylon all contracts whatever made in Ceylon (except recognisances) must have a reasonable *causa*; otherwise no obligation can arise. The word cause is not the same thing as consideration in English law. *Rood v. Wallach*, decided in 1904 by Sir James Rose Innes C. J. and Solomon and Mason JJ., is accepted as good law in this Colony⁵.

This rule applies to deeds also, consideration must proceed from the party to whom the promise is made

¹Decided 12th May, 1904.

²Van Leeuwen. *Kotze's Note*, Vol. II, 28.

³Burge's *Colonial and Foreign Law*, 2nd ed., Vol. I, 186; *A Digest of the Civil Law of Ceylon*, by P. Arunachatan,

pub in 1910; Thompson's *Institutes* 1 vol. p. 176; Pereira's *Institutes* Legislative enactments, 1707-1907.

⁴Ordinance No. 5, of 1852.

⁵21 S. A. L. J. pp. 137-150.

or from a third person moved or affected by him. (This rule is like the rule in the Indian Contract Act [sec. 2(*d*)]. *Lipton v Buchanan*¹ decided that the doctrine of *causa* was quite distinct from the English Doctrine of Consideration.

Ilbert says that in Ceylon the Roman-Dutch law is still the common law. But by express legislation *cessio bonorum* is repealed. Conveyances by insolvent debtors, with intent to defraud, are void. If any person adjudged insolvent under this Ordinance, No. 7, of 1853, amended by Ordinance No. 24, of 1884, amended by Ordinance No. 3 of 1890, except upon marriage of any of his children or for some valuable consideration conveys, assigns, or transfers to any of his children or to any other person any real or personal property whatsoever or delivers or makes over to any such person any bills, bonds, notes or other securities, such first-mentioned person being at the time of making such conveyance, etc., insolvent, the court has power to order any such property to be sold and disposed of for the benefit of the creditors under the insolvency, and every such sale is valid against the insolvent person and such children and persons and against all persons claiming under him.

Transfer or assignment of hypothecations must be by deed and registered.

The word Bill of Sale includes bill of sale, assignment, transfers or declarations of trust without transfer.

A provision as to the mortgage of ships is based on the English Shipping Act.

Ordinance No. 22, of 1866, enacts that the law of England is to be introduced in certain cases relating to partnership, joint stock companies, banking agency, carriers by land, fire, life and marine insurance. In these respects the law to be administered is the same as in England in like cases.

¹1904, 8 New L. Rep. 49 Ceylon.

The Ordinance of 1855, as amended by subsequent Acts, enunciates the policy of gradually displacing the Kandyan law by English law. Bills of Exchange and maritime law are on the lines of English Acts.

Natal.

Natal.—In July, 1856, Natal became a separate colony. The common law of this colony is Roman-Dutch law. The legal tribunals have interpreted the Doctrine of 'Causa' in the sense in which it is accepted in Transvaal, which implies that it is not the same as the English Doctrine of Consideration.

The Bills of Exchange law, No. 8, of 1887, is based on the English Bills of Exchange Act, 1882. Sec. 26 of the Bills of Exchange Act defines consideration in a bill as: (a) any consideration to support a simple contract; (b) an antecedent debt or liability, such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

Valuable consideration for a bill is not necessary to entitle the holder to sue thereon.

Law 14, of 1882, was enacted to amend the law No. 22 of 1863, and was intended to prevent community of goods attaching to certain marriages and to enable the spouses of such marriages to devise their properties.

There is a law (No. 12 of 1884) which is a close copy of the English Statute of Frauds¹. No action can be maintained on any contract made after that date, relating to any subject-matter mentioned therein, unless and until such contract is evidenced by writing signed by or on behalf of some person sought for, whose contracts the person sued may then be liable, viz.: (1) any contract of suretyship or liability for the debt of another; (2) any contract for the sale, purchase, mortgage, charge, gift of or on any immovable property or any interest therein; (3) any contract to grant or take a lease; (4) any other contract that is not to be performed within the space of one year.

¹29 Car. II. c. 3.

Insolvency Law No. 47 of 1887, sec. 3, abrogates *cessio bonorum*; there is an amended Act, No. 21, of 1891, dealing with acts of insolvency, in Natal or elsewhere where an insolvent person makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof *cf.* 46 and 47 Vict., c. 52, sec 4, subsec. 5, which enacts that to make an act of bankruptcy, the conveyance must include substantially the whole of the debtor's property and there must be no fair present equivalent¹. Certain purchases made *bona fide* without notice and for value from a person holding under a void transfer are protected.

Section 90.—Every alienation, transfer, gift, delivery, etc., of any goods or effects, moveables or immoveables, personal or real, made by any insolvent at a time when it shall be made to appear by proof that his liabilities fairly calculated exceeded his assets fairly valued shall, unless the same shall have been made *bona fide* and upon just and valuable consideration, be null and void. And whenever the immediate and necessary effect of any such alienation, transfer, gift, cession, delivery, mortgage or pledge as aforesaid shall be to cause such an excess of liabilities over assets, then the same, to the extent to which such excess shall have been produced, shall be null and void.

The post-nuptial contract comes within the section so as to make the property of both spouses even that which was acquired before marriage liable for the debt.

Section 91 deals with settlements made by insolvent persons. This section follows the English law of Bankruptcy. The Act 39 of 1896² enacts that the system, code or body of law, commonly called the Roman-Dutch law, as accepted and administered by the legal tribunals of the Colony of Cape of Good Hope up to 27th August 1845, and as modified by Ordinances, Laws and Acts now in force and heretofore made and

¹Twyne's case; 1 S. L. C. p. 99.

²Supreme Court, sec. 21.

passed in this Colony is the law for the time being of this Colony.

All matters and disputes in the nature of Civil cases between natives living under native laws are to be tried according to native laws, customs and usages unless they are repugnant to natural equity and settled principles.

The Doctrine of *Causa* applies to all subjects in the Colony of Natal, because Ordinance No. 12, of 1845, enacts that Roman-Dutch law in and for the district of Natal is the common law of the district¹.

The Transvaal.

The Transvaal.—A Proclamation of the Transvaal, No. 14 of 1902, dated 10th April, 1902, provides that Roman-Dutch law, except in so far as it is modified by legislative enactment, shall be the law of the Colony.

The Doctrine of *Causa* was discussed in *Rood v. Wallach* and Sir James Rose Innes C. J. decided that the meaning of *causa* was quite distinct from the meaning of consideration in English law. A deliberate and serious agreement, not immoral or forbidden by law, can be enforced by action.

There are various Acts based on English statutes, e.g., the Insolvency Law No. 13, of 1895 (sec. 39), enacts that benefits conferred by *antenuptial* contract are secure, except where sequestration takes place within two years from the date of registration and the debtor is shown to have been not solvent at that time. The Transvaal Proclamation, No. 11, of 1902, deals with Bills of Exchange, cheques and promissory notes. The Transvaal Bankruptcy Law, No. 13, of 1895, amended by No. 5 of 1905 is based on English law².

Orange River Colony.

Orange River Colony.—In 1902 Letters Patent were issued for the government of the Colony. Roman-Dutch law is the basis of the law of the Colony. The constitution of the Orange Free State (Art. 57) enacts that Roman-Dutch law is the common law of

¹ Boshoff v. Lotter, Brome's Digest, 74.

² Transvaal Colony Pro-

clamations, 1900-1902; Statute Law of the Transvaal, 1901.

that Colony where no other law has been passed. Roman-Dutch law means that law found in force in Cape Colony at the time of the appointment of English judges in place of the previously existing Council of Justice, and does not include any new laws as introduced into Holland and which are not based on, or are in conflict with the Old Dutch law as expounded in the Text books of Voet, Van Lieuwen, Grotius, Van der Keessel¹.

This system is kept in force by Ordinance (Orange River Colony) No. 3 of 1902, which enacts that the Common law in the Colony shall remain the Roman-Dutch law in so far as it has been introduced into and is applicable to South Africa and that the Statute law of the Orange Free State shall continue in full force unless amended or repealed by subsequent ordinances. The Doctrine of *Causa* is the same as obtains in South Africa. Rood v. Wallach² is good law in this Colony. The Bankruptcy and Insolvency Laws are No. 5 of 1895; No. 14 of 1899; and 24 of 1899.

Southern Rhodesia.—The law in force is Roman-Dutch law as it is administered in Cape Colony. It is enacted that the law to be administered shall be, as far as not inapplicable, the same as the law in force in the Colony on the 10th June, 1891, except so far as that law has been modified by any Order in Council, Proclamation, Regulation or Ordinance³. The Doctrine of *Causa* obtains in this Colony.

British Bechuanaland.—The Common law of this country is Roman-Dutch law. By a Commission under Royal Sign-Manual of 29th September 1885, the Governor of Cape Colony also became Governor of this place and Cape law was applied to it. Where the parties to a civil suit are natives, native law may be administered even by British courts. Proclamation No. 2, British Bechuanaland dated October 6th, 1885, declares that

¹ Burge's *Colonial and Foreign Law*, vol. I, p. 56.

³ Southern Rhodesia Order in Council, 1898, Art. 49 (2).

² 1904, S. A. L. J., 147.

the laws then in force in Cape Colony shall, as far as applicable, be in force in this place unless altered by Proclamation.

The Cape of
Good Hope.

The Cape of Good Hope.—Roman-Dutch law is the Common law of this Colony. The word *Causa* is decided by Sir Henry de Villiers¹ to be equivalent to consideration in English law and according to his ruling the word *oorzaak* means valuable consideration. The conditions for valid obligation are: (a) a lawful source, (*causa*) *redelyke oorzaak* from which they spring; (b) persons capable of binding themselves; (c) a thing capable of being the subject of an obligation. *Scott v. Thunie*² decided in October, 1904, by Sir H. D'Villiers C. J. is to the same effect.

In English law the person in whose favour a promise is made must give money or money value to the promisor in order to enable such first-named person to maintain an action. Mere serious intention will not give any right of action at the instance of the promisee unless he has given or promised to give something, *e.g.*, an option to buy a thing after a week for a stated price is not binding unless something is to be paid for the promise. In Cape Colony the English rule of consideration prevails; there is no deed under seal; all agreements to be binding must have valuable consideration excepting cases of gift and suretyship. If a contract is made without valuable consideration it is called *nude pact*. In *Alexander v. Perry*³ it was decided that *causa* and consideration means the same thing. Kotze⁴ says: "What you seriously agree to do, you must faithfully fulfil, whether you get £100 for your promise or nothing at all. This view was accepted in *Rood v. Wallach*⁴ by the Supreme Court of the Transvaal. But in *Mtembu v. Webster* the Supreme Court of Cape Colony decided the case according to *Alexander v. Perry*. Sir Henry de Villiers stuck to his own decision adding that "on the ground of

¹*Mtembu v. Webster*, 1904. *aries.*

²*Buch*, p. 59.

³*Van Leeuwen's Comment.*

⁴1904, T. S. 111.

stare decisis " that case must be followed. In *Scott v. Thieme*¹ Sir Henry de Villiers used the words 'proper cause' and did not use the expression valuable consideration; but he still adheres to his view of the English Doctrine of Consideration.

The Insolvent Estates Ordinance 166 of 1843, Act 15 of 1859, amended by Act 11 of 1873, Act 38 of 1884, is based on the English Bankruptcy Act: *cessio bonorum* is abolished, the law of *læsio enormis* repealed.

The Ordinance of 1875 enacts that no *antenuptial* contract is valid unless registered in deed of Registry.

The Cape Colony Act No. 8, of 1879, sec. 9, introduces English law into all questions relating to shipping and insurance.

Dr. Bisschop² says: "English legal procedure has developed historically. So has that which is in force in Cape Colony. It is so closely interwoven with the common law of South Africa that it would be impossible to replace Colonial by English rules of procedure without destroying to a large extent the common law itself. There is no need for so drastic a measure nor is there any call for it." These words apply very truly to this Doctrine of *Causa* we are considering. Those who advocate the policy of abolishing the Doctrine of *Causa* as contained in Roman-Dutch law seem to betray ignorance of the principles of Dutch Jurisprudence; law is not an arbitrary and accidental thing. The relations which are expressed by the words 'property', 'obligation', 'sale' are not mere figments of jurists, but they express real transactions of life. The system of law has to regulate the relations of life and each system of law tries to satisfy that want in Society. Though an ideal system is difficult to be devised all at once, it is quite possible to tend towards it. The task of the jurist is simplified by reflecting upon the various systems and comparing one with the other. That system must satisfy reason and be based on the

¹Decided 24th Oct. 1904.

² 20 *Law Quarterly Review*,
p. 41.

experience of the masses of people. Such a system must aim at perfection. If we judge the Doctrine of *Causa* as it obtains in Roman-Dutch law from this standpoint, it has justified its claim for existence ; and it is the duty of the Courts to maintain the doctrine without mixing it up with other systems. This doctrine requires to be developed but not displaced by a false importation of doctrine from a different system. Those who are against the continuance of the doctrine maintain that it hampers seriously the administration of justice ; the doctrine, they argue, recedes into the past and the doctrine of the past is less and less applicable to present conditions of life. To such critics the answer is that the Doctrine of *Causa* in Roman-Dutch law is more reasonable and philosophical than the Doctrine of Consideration in English law. The Doctrine of *Causa* is based upon principles of justice and honesty ; it satisfies the requirements of economy and fair play. It is not on mere consideration of exchange. It is based on the principle of right and wrong. There is every reason to believe that the Privy Council will definitely decide in favour of Roman-Dutch law in the British Colonies affected by it, while English Statute law may be applied to mercantile contracts.

Kotze, C. J.¹, writes : “ In certain of our Colonies, *e.g.*, Ceylon, British Guiana and all the South African Colonies and States, the Roman-Dutch law, as it prevailed in Holland previous to the introduction of the Code into that country, is still in force.....In South Africa and the Transvaal, Van Leeuwen’s work is of great value. By a local statutory provision the Courts of Justice in the Transvaal must regulate their decisions agreeably to the law laid down in the *Introduction* to Grotius, the *Commentaries* of Van Leeuwen and the *Institutes* of Van der Linden ; but when these authorities differ or are silent on any point the Courts must decide in accordance with the general justice obtaining in South Africa.”

¹Introduction to translation of Van Leeuwen’s *Roman-Dutch Law*, p. 7.

CHAPTER X.

THE DOCTRINE OF CONSIDERATION IN ENGLISH LAW COMPARED WITH THAT IN SCOTCH LAW.

Till the 14th century the laws of England and of Scotland were very much alike. The study of *Regiam Majestatem* and *Quoniam Auachamenta* leaves the impression that they were adapted from the writings of Glanville. The Court of Sessions was founded in 1532. The lawyers were trained in Roman Civil law and Canon law. Bell¹ says that "prior to the Reformation, Scotland possessed in the Canons of the Provincial Councils a Canon law of her own." Scotland and France were allies for a long time, and Scotland was also under the influence of the Low Countries. The Mercantile law was taken from the law of England. Lord Mansfield declared the maritime law to be the same for both countries. The law of Scotland consists partly of Statute and partly of Customary laws². Mackenzie³ says: "Scotland imported a large portion of Roman Jurisprudence to make up the deficiencies of municipal law which had made little progress as a national system till sometime after the establishment of the Court of Sessions in 1532 by James V. after the model of the Parliament of Paris. Properly speaking the teaching of the Civil law commenced in Scotland at the Restoration in 1560."

The Act of Union between England and Scotland⁴ expressly enacted that the legislature for these two

¹*Principles*, p. 72.

²Burge, *Colonial Law*,
Vol. 36.

³*Studies in Roman Law*
2nd ed., p. 22.

⁴6 Anne, c. 11

countries would be one, but the existing separate laws and courts for each country would be retained, except so far as abrogated by the Act or by subsequent legislation¹.

The law of Scotland now consists of the Acts of Scotch Parliament prior to the Union and of the Acts of the British Parliament.

The term contract denotes an agreement, obligation or legal tie whereby one person voluntarily binds himself to another, either by words or conduct to pay money or to do or abstain from doing something. In Scotch law, the term 'obligation' denotes more than the term 'contract' of English law. In English law contracts are divided into contracts of record, deeds and simple contracts; in Scotch law contracts are divided into written and verbal.

In English law the *causa* in contracts under seal consists in the solemnity of the deed, while in simple contracts, *causa* consists in valuable consideration.

In Scotch law the division of contracts is based upon the manner of proof. This is the vital point of Scotch and Continental Jurisprudence in understanding the Doctrine of *Causa*. The Scotch doctrine lays great stress upon the evidence of witnesses to prove a spoken word; while the English doctrine looks to some legal detriment incurred by the party relying on the promise of the other party. The Scotch doctrine relies upon very elaborate procedure in finding out the true intention of the parties. Both aim at finding out the true intention of the parties but adopt different methods. In both systems the peculiarity by which the enforceable contract is distinguished from the unenforceable contract is seen in legal solemnity and mutuality.

In Scotch law contracts are divided into those which can be proved orally and those which cannot be proved except by writ or oath. The latter contracts consist of those obligations which are unilateral. The rule

¹Art. XVIII.

of Scotch law adopts the rule of proof of contracts and does not concern itself with the constitution of contracts, as English law does. Scotch law applies the same rules of proof to a gratuitous promise to pay money and to the obligation to return money actually received. The important point in Scotch doctrine is the nature of proof, which must be adduced to satisfy the claim.

In English law consideration is regarded as a solemnity, and if it is absent its solemnity can be supplied by a deed under seal. In *Rann v. Hughes*¹ it was held that all contracts are by the law of England distinguished into agreements by specialty or agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain as contracts by writing.

Though English and Scotch doctrines differ in certain points in theory, they resemble each other in the restrictions which they impose on proof of gratuitous obligations.

A.—RULES OF THE DOCTRINE IN THE LAW OF CONTRACTS.

RULE I.—In Scotch Law all contracts are valid and binding without any consideration being given.

In England a promise when not contained in a deed under seal must have consideration. In Scotland every promise is effectual even though it be gratuitous. This Doctrine of Consideration is peculiar to the English system of law and does not exist in the law of Scotland. The jurisprudence of the Continent or of Scotland does not require consideration as an essential element of contract. The conception of exchangeable value of some kind is peculiar to the Common law of England. It is not embodied in Scotch law. In English law for the validity of an informal contract bargain is required in addition to the deliberate intention of the

parties. This insistence on the Doctrine of Consideration is peculiar to the law of England ; it is not universal or necessary.

Erskine¹ defines contract as 'a voluntary agreement between two or more persons whereby something is to be given or performed or abstained from upon one part for a valuable consideration either present or future or a counter engagement on the other part.' There must be *consensus ad idem*. Stair² defines conventional obligation as 'one whereby a party may restrain from the doing or compel us to the performing of that whereof we have given him power of restraining or exaction ; for in the creditor the obligation is the power of exaction ; and in the debtor it is the debtor's duty or necessity to perform.' Grotius³ says acceptance is the necessary element in every conventional obligation. The Canon law has removed the restriction which Roman law has put on the maxim that no action can be allowed on a *nuda pacta*. Hence promises are held to be binding without any restriction as to form as in Roman law, or consideration as in English law. Stair⁴ says : "Roman law did not lend its civil authority to pacts and agreements unless they were clothed with solemn words by way of stipulation. We shall not insist on] these because the common custom of nations has resiled therefrom, following rather the Canon law by which every paction produceth action." Erskine⁵ says in Roman law contracts were classed as *re, verbis, literis, and consensu*. Real contracts required that besides the consent of the parties something should be actually paid or performed by one of them in order to constitute an obligation against the other, while in innominate contracts something must have been actually given or performed ; it must be resolved into a simple convention, or *nudum pactum*, which did not produce any action by Roman

¹ *Principles of the Law of Scotland*, p. 258, 20th ed.

² *1 Institutes*, ed. by More, 1, 10, 1.

³ *De Jure Belli*, 1, 2, c. 11, sec. 14.

⁴ *1 Institutes* (More), 1, 10, ;

⁵ *Institute III*, 1, 17.

law. The party who gave or performed had an option either to resile from the contract or to sue the other party for performance by means of an *actio præscriptis verbis*. The law of Scotland regards all contracts including innominate contracts as obligatory on both parties from the very beginning, so that neither party could resile, even though the one had and the other had not performed his part of the contract. In the law of Scotland there is nothing corresponding to the verbal contract of Roman law. Verbal obligation in the law of Scotland includes : (a) a promise where nothing is to be given or performed but upon one part, and which is always gratuitous ; (b) a verbal agreement which requires the intervention of two different persons at least who enter into mutual obligations. Stair says the Act of *Sederunt* of November 27th, 1592, enacted that verbal obligations would be effective ; all irrelevant clauses in contracts, bonds and other writings should be judged of precisely according to the words and meaning of the said clauses without the least mention of pactions or promises. The reason why all verbal agreements and promises must be obligatory in every nation where no special exception is made by positive institution is that by a rule of law every agreement in a lawful matter though constituted only verbally induces a proper obligation. But this general rule will not apply to obligations relating to heritable rights ; because in transmission of heritage some kind of writing is required. This exception applies to obligations concerning land, such as contracts relating to sale, and a lease for more than one year, which must be in writing. In contracts *litteris* the *obligatio* was constituted by a writing by which the grantor acknowledged that he had received a sum of money and bound himself to pay. In Scotch law all written obligation, and particularly bonds for sums of money, are founded on prior contracts and so have a cause antecedent to, and distinct from, the obligations themselves, and are effectual from the making thereof.

Consideration in
Negotiable
Instruments.

The Scotch law does not require that the bill of exchange should be granted for value. The words 'value received' do not form part of the bill at all. Valuable consideration for a bill may be constituted by : (a) any consideration sufficient to support a simple contract ; (b) an antecedent debt or liability which is deemed valuable consideration, where the bill is payable on demand or at a future time.

Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

Where the holder of a bill has a lien on it, arising either from contract or the implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. The English Bills of Exchange Act, 1882, is made applicable to Scotland. The peculiar privilege of summary diligence is still preserved in Scotch law (sec. 98). Summary diligence in Scotland is based on protest for non-acceptance or non-payment which must be registered within six months. It is only competent when the bill is regular on the face of it¹.

The application of the Bills of Exchange Act, 1882, to Scotland does not affect the Scotch law that valuable consideration is required to support an obligation. But want of value may be a good defence when the bill is disputed on other grounds, *e.g.*, illegality, fraud or failure of value². In English law there is no limit to the sum for which an English bill, note or cheque may be drawn. By Bank Notes³ negotiable bills and notes for less than one pound are made void in Scotland ; an exception to the rule is made in favour of drafts on a banker for payment of money held to the use of drawer⁴. Section 53 of the Act does not apply

¹See Thomson on *Bills*, 2nd ed., p. 410; Thorburn's *Bills of Exchange Act*, p. 214; Order XIV.

²Bell's *Principles*, 9th ed.,

sec. 333.

³Scotch Acts 8 and 9, c. 38' 1845, secs. 16 and 20.

⁴Chalmers, p. 11.

to Scotland. Section 100 of the Act removes the technical rules of evidence that relevant facts could be only proved by writ or oath¹.

RULE II.—In Scotch law contract is completed by offer and acceptance of the parties. It is not necessary that there must be in addition a bargain.

The Scotch law does not require that one party should derive any benefit from the promise or that the promisee should suffer any detriment. This view is peculiar to the English Doctrine of Consideration. In Scotch law no consideration is required to a contract, whether by deed or not; and it is not necessary to prove it unless consideration is made by the parties apart of the contract in their agreement.

RULE III.—If one party to a contract stipulates in favour of a third person, the contract becomes irrevocable and the right vests in that person.

In *Macdonald v. Hall*² Lord Watson said: "The general rule of the law of Scotland is that every stipulation in a mutual agreement is binding on the person obliged, whether it is conceded in favour of the other contractor or a third party." That stipulation must be: (1) In favour of a third person, clearly expressed to show that it was the intention of the contracting parties to benefit that person and that the contract was made with that intention. (2) That third person must be indicated clearly. (3) The contract must be irrevocable when that third person sues to enforce the right. In *Gandy v. Gandy* (1885)³ Cotton L. J. said: "As a general rule a contract cannot be enforced except by a party to the contract; a third party who is a stranger to the contract cannot do so. An exception to this general rule is if the contract, although in form it be with A, be intended to benefit B, so that

¹Thorburn's *Bills of Exchange Act*, p. 218; Bell's *Principles*, 333b.

²20 R. H. L. 88, 95.

³30 ch. D. 57, 66.

B can claim beneficial right, Court will allow him to sue on that contract." Jessel M. R.¹ said: "A mere agreement between *A* and *B* that *B* shall pay *C* (an agreement to which *C* is not a party directly or indirectly) will not prevent *A* and *B* from coming to a new agreement next day, releasing the old one. If *C* was a *cestui que* trust, it would have that effect." In *Wannoch* 1759² a husband inserted in an *ante-nuptial* contract a stipulation in favour of his step-mother. He died. The provision was held binding though she was no party to the contract. In *Gale v. Gale* 1876³ a widow on her second marriage with the husband agreed to convey property for the benefit of the children by her former marriage. The Court enforced that contract in favour of the children. Fry J. said: "The general rule is that in favour of a stranger the Court will not enforce a contract if it is not perfected and will not interfere for the purpose of giving further performance of a contract or covenant. Is this principle of universal application, or are there exceptions? It is not universal because there is nothing better established than that the children of a marriage can enforce a marriage settlement." These cases show the relationship of the Scotch doctrine of *jus quosutum* to the English idea called equitable.

'The English rule,' writes Pollock⁴, 'is that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may; also that near relationship makes no difference as regards Common law rights of action.' The final decision was in *Tweddle v. Atkinson* 1861⁵. In equity the doctrine is not free from doubt. In English law, to enable a third person to recover money which he has paid, he must show that he was requested to pay. In Scotch law any stranger may, without the knowledge or consent of the debtor, pay a debt

¹In *re Express Engineering Co.*, 1886, 16 ch. D. 125, 129.

²*Dictionary of Decisions*, Morrisson, Vols. XIX—XX,

p. 7730.

³6 ch. D. 144.

⁴*Contract*, p. 223.

⁵1 B. and S. 393.

due from him to the creditor. In *Smith v. Gentle*¹ Lord Mackenzie said : “ If the creditor insists on putting the debtor in jail, he must assign his security to a third person paying the debt. The right of a stranger to an assignation is an equitable one and the Court will compel the creditor to grant it if it is not prejudicial to him .”

RULE IV.—Inadequacy of price without fraud does not affect the validity of a contract. There must be estimable money value.

In contract of sale inadequacy of price is no ground to set it aside. *Actio quanti minoris* is confined to title or quality of the thing promised. If there is a material error as to price there is no sale. There can be no sale without the price being fixed by the contract. This is a rule of Roman law accepted in Scotland.

The rule of Roman law that if the price is less than half the value of the thing sold, the sale can be set aside or action can be brought; for the deficiency does not obtain in the law of Scotland.

Erskine² says: “The price ought be just, that is, proportionate to the value of the thing sold, and therefore, when a subject was sold for less than half of its value, the seller might have recovered it on paying back the price to the buyer. But this doctrine being repugnant to the common nature of contract is rejected by our usage; for every price which the parties have agreed upon is in the judgment of the law just as if they had not been drawn into the contract by fraud or force.”³

The Sale of Goods Act, 1693, is made applicable to Scotland.

¹6 D. B. M. 1164.

³See also Stair, June 23rd,

²*Institutes* (ed. by Ivory) 1669.

Bk. III. Tit. 3, sec. 4, p. 641.

RULE V.—The thing promised at the time of the agreement must be definite, legal, possible and not opposed to public policy.

In Roman law all agreements to engage in a game were *sponsiones ludicræ*. *Sponsio* was a wager in a civil suit in which litigants staked a sum of money to wait the decision of the judge or arbiter. It also meant an agreement to take part in a trial of skill. This law is adopted in the law of Scotland. In Scotland all games have been dealt with alike because courts of justice have been instituted to enforce the rights of the parties arising from serious transactions. The Courts refuse to recognise any questions arising out of games. Wagers and lotteries are by the Common law of Scotland regarded as *pacta illicita* and no action can be brought to recover anything won on a wager.

In this respect the rule is similar to English law. A mere wagering dispute is *sponsio ludicris*. By Statute 8 and 9 Vict. (c. 109, sec. 18) all contracts, whether parol or in writing, by way of gaming or wagering, are null and void except subscriptions towards a lawful game, sport or pastime. Contracts for illegal and immoral objects are void. An agreement in general restraint of trade is void ; but for partial restraint it is good. A promise to do an impossible thing will not be enforced by the Court. The Court will find out the true intention of the parties. If it was due to error, it will be void ; otherwise it will award damages.¹

Failure of
object.

Condictio indebiti was allowed in Roman law for recovering money paid to another under the belief that debt was due to him when really there was no debt due. By Scotch law action is allowed to recover money paid under a mistake. The Court of Sessions decided that a mistake, whether in law or fact, is sufficient to recall payment.² If the payment was made to satisfy a natural obligation, action would not lie to recover it, where payment was made under a mistake but with

¹Bayne, 1815, 3 Dow 233.

²Carrick, 17778, M. 2931.

natural obligation, it was held that the money could not be recovered. If the payment is made with the knowledge that it is not due, there is waiver of objection and admission of the debt.¹

Condictio causa data, causa non secuta was allowed in Roman law to recover things given with a view to a certain event; action was allowed to recover that object if the event did not happen; e.g., presents made in contemplation of marriage could be recovered if the marriage did not take place; but the party claiming to recover must not have prevented the happening of the event.²

The action of *condictio debita* is very much like an action for money had and received. Scotch law follows the rule of Roman law that action will not lie where the sum paid is due in equity, or the person paying knew at the time that there was no debt due.

If there is an error in law the House of Lords has decided that it is not relevant for a party seeking restitution to aver that the payment was made under a mistake of law. In *Wilson and M'Lellan*³ the Lord Chancellor said: "When a person pays money under a mistake he has no right to recover that money unless it was a mistake of fact." But a discharge was granted, *sine causa*, in ignorance of legal rights in *Dickson v. Halbert*,⁴ in which case the Lord President said: "I apprehend that the matter substantially stood in this way that there were very few cases in which redress for payment made in error of law would be given. It was not every error of law that would give a party a right to repetition of the sum paid by him. It could be under very strong and peculiar circumstances and in

¹ Erskine, *Principles*, III. tit. 3, sec. 4; Stair, *Institutes*, Book I. tit. 7, sec. 9; Bell's *Principles*, III, sec. 531; Kane's *Equity*, 200. Erskine, III. tit. 1, sec. 10; *Journal of Jurisprudence*, Vol. XXIV, 113. ³ 1830, 4 W. and s. 398. ⁴ 2nd Series, Vol. XVI, p. 594.

² Stair, Bk. I, tit. 7, sec. 7; 594.

exceptional cases and that rather appears to have been the doctrine of civil law. But I think the general rule of our law is that there is a difficulty in sustaining an action of *condictio indebiti* in consequence of a party's ignorance of law; and no effect would be given to such ignorance except in peculiar circumstances. I am not sure that in Sinclair's case the Lord Chancellor makes the point clear. He tells us what the law of Westminster Hall is, but I do not think that the House of Lords would feel themselves tied up by that opinion. Therefore I do not know that it is finally decided that in no case and under no circumstances can error in point of law be held as a ground for *condictio indebiti*. I can conceive cases in which error of law would not entitle the party to repetition.....It is a principle with us that if a discharge be granted *sine causa*, it may be reduced." In *Mercer v. Anstruther's Trustees*¹ the Lord President said: "If error in point of law lie in essentials or, in other words, if an error as to the true legal rights of the party complaining in the subject-matter of contract of which he complains be as a general rule a good reason for reduction it does not occur to me that the remedy ought to be barred merely on account of the difficulty of the question of law which requires to be solved to ascertain what are the true legal rights of the parties complaining."

In Scotland no purchaser of stolen goods can acquire an absolute right to them against the true owner. In England a sale of stolen goods in open market gives the purchaser a good title until the true owner has prosecuted the thief to conviction.² Such a rule does not apply to Scotland, but is peculiar to English law. The case of *Market overt*³ deals with English law.

¹1870, 3rd Series, Vol. IX, pp. 618, 628.

²Sale of Goods Act, 1893, sec. 22.

³1596, 5 Coke, *Reports*, 83b; *Tudor Mercantile Cases*, 3rd ed. 274 and notes; *Todd v. Armour*, 1882, 9 R. 902.

RULE VI.—A promise may be given from the motive of returning a benefit already done.

The highly technical rule of English law that consideration must not be past is not accepted in Scotch jurisprudence. Moral consideration is binding. Hence cases like *Eastwood v. Kenyon* and *Tweddle v. Atkinson* are good in Scotch law though not in English law ; the remarks of Lord Mansfield that a promise to do what the promisor is already under moral obligation to do is in accord with the spirit of Scotch law.

RULE VII.—Obligation can be extinguished by the bare consent of the creditor.

In English law a contract under seal can be released by discharge under seal.

In Scotch law a debt constituted by writing cannot be extinguished without the writ or oath of the creditor. The renunciation of a right or obligation made by writing cannot be proved by parol evidence ; there must be a written discharge. Erskine¹ says obligations may be extinguished by the bare consent of the creditor ; for every creditor in an obligation may renounce or discharge whatever right is constituted in his own favour without special performance or indeed without any performance by the debtor. An obligation which is constituted verbally may be extinguished by a verbal declaration of the creditor. But debts formed by writing cannot be extinguished without either the creditor's oath or a written acknowledgment signed by him.

Simple contracts may, before breach, be released or discharged by parol agreement. In Scotch law a verbal obligation may be extinguished by the verbal declaration of the creditor that he releases the debt, but it is otherwise with written contracts. If a contract is broken, the right of action can be discharged by release under

¹*Institutes*, Vol. II, sec. 8.

seal or by accord and satisfaction. In Scotch law discharge, whether before or after breach of contract, may be by acceptilation.¹

The peculiar rule of English law that a smaller sum cannot be a satisfaction for a larger amount at the same time and place has no place in the jurisprudence of Scotland.

In order to prove discharge of any party to a bill or note before it becomes due, it is sufficient to prove by parol evidence an express renunciation of the claim on the part of the holder. In Scotch law discharge of any party to a bill or note from liability upon it can be proved by the writ or oath of the holder of the bill. Now by the Negotiable Instrument Act (sec. 100), a change has been made doing away with the technical rules of the Scotch law of evidence.²

RULE VIII.—A Composition is an agreement between a debtor and his creditors, whereby the debtor offers to his creditors to accept a portion of his debt in full discharge of the liabilities.

Bell³ says a composition is an agreement between a debtor and his creditor that the debtor shall at a particular time pay part of his debt and that the creditor shall discharge the debt on condition of its being so paid. Such a contract may be entered into with an individual creditor or with all the creditors. In the first case the contract is binding between the debtor and creditor, whatever may be agreed to be paid. In the second case there is a mutual contract depending on two conditions: (a) all creditors are to be treated equally; (b) all are bound to carry it out and no one is bound if others do not fulfil the contract. Stair⁴ says a transaction may be interposed in the matter of all contracts, and it is a most important contract whereby all pleas and controversies may be prevented or terminated: for thereby

¹Erskine, Book III, tit. 4, sec. 8.

²Thorburn, p. 218; Bell's *Principles*, 9th ed. 333b.

³*Commentaries*, 7th ed, Vol. II, p. 398.

⁴1, 17, 2, 4th ed.

all parties transacting quit some part of what they claim, to redeem the vexatious and uncertain event of pleas. He adds: "It is therefore the common interest that transactions should be firmly and invariably observed which both by Roman law and our customs hath been held as sacred and necessary for men's quiet and peace."

RULE IX.—An antecedent act, forbearance or promise, for a subsequent promise of the other, may give rise to liability.

The technical rule of English law that consideration must be concurrent has no place in the jurisprudence of Scotland. It follows the Roman law in these matters, and if natural obligation arises, the Court will enforce it. Stair writes¹: "Pactions, contracts, covenants and agreements are synonymous terms both in themselves and according to recent customs of this and other nations so that it will be unnecessary to trace the many and subtle differences among pactions and contracts of Roman law. Contracts are valid by sole consent except where writ is requisite."

RULE X.—Mutual promises are not binding until something is done in pursuance of the promise by one of the parties.

A promise of marriage, according to Scotch law, can be resiled from as long as matters are entire, but if anything be done by one of the parties whereby a prejudice arises from non-performance, the party who broke that promise is liable for the breach². Fraser³ writes: "Early decisions denied action of damages on account of breach of promise of marriage except in so far as patrimonial loss could be shown; such as purchase of wedding clothes or any similar expense incurred in the expectation of marriage; although it was held that if a penalty in case of failure had been expressly stipulated, that penalty could be exacted. It was settled that damages

¹Vol. I, Tit. X, sec. 10, 4th ed. Scotland, 20th ed., p. 57.

²Erskine's *Principles of Husband and Wife*, Vol. I, pp. 487, 488, 2nd ed.

were due, not only for pecuniary loss, but in *solatium* for the wrong done; and as in an old case 'for the loss of the market¹.'"

In Roman law mutual promises were not binding and this is Scotch law also ; in English law mutual promises at the same time form a valuable consideration for each other.

RULE XI.—There is no instrument in the nature of a deed in Scotch Law : there must be good ground for the validity of any instrument.

The use of seals is wholly unnecessary in executing private deeds. Bell² says by the Act of 1584 (ch. 4) sealing was dispensed with in reference to such contracts or obligations as were subscribed by parties and agreed upon to be registered in the books. Erskine³ says all obligations when reduced to writing, though grounded on contracts which are effectual without writing, require by the Scotch law certain solemnities to render them binding. "In deeds a seal used to be employed but now it is dispensed with."⁴

In Scotch law a debt under seal has no priority over a debt which is created by simple contract. The division of contracts is into written and verbal. All contracts are valid without consideration whether by deed or not.

The law of England as stated by the Law Commissioners in their report⁵ is that 'a contract not under seal of the obligor is incapable of being enforced by legal proceeding unless it be supported by a consideration ; the rule of civil law *ex nuda pacto non oritur actio* being a maxim of the law of England and Ireland. A consideration is presumed when the contract is under seal and consideration cannot be alleged by the obligor against want of this presumption. In Scotland there is no such distinction.'

¹Hogg v. Gōw. 27 May 1812, F. C.

²Lectures on Conveyancing, Vol. 1, p. 72.

³Institutes, ed. by Ivory, Vol. II, p. 23.

⁴Titles to Land Consolidation Act, 31 and 32 Vict., 101, sec. 78; Act of 1874. Conveyancing Act, Scotland.

⁵Law of England in 1855.

Specific performance is granted in English law on the supposition that damages will not be an adequate remedy. In Scotch law specific performance is granted as a matter of course in all cases where the act is not impossible, and even though damages are adequate.

B.—THE DOCTRINE OF CONSIDERATION IN THE LAW OF PROPERTY AND CONVEYANCING.

RULE I.—The presence or absence of *Causa* affects the legal nature of a transaction.

Donation is a voluntary gift of any subject by a person **Donation.** who is under no antecedent legal obligation to give it. Acceptance by donee is not essential to complete gift. The two things required by law to complete donation are: (a) transmission of the subject from the donor to the donee or someone on his behalf; (b) the presumption of intention to give.

If it is moveable property, it must be delivered. If it is immoveable property, there must be delivery by writing. There must be *animus donandi* to complete the gift. Lord Gunlee said: "The Roman doctrine of *mortis causa* has no application to this case. A person may contract an onerous obligation of which he cannot get quit though it was to be performed after death. We have nothing like the Roman doctrine of *donatio mortis causa*. It has been attempted to be applied to *common mortis causa settlements*; but the decisions do not support that ¹."

The law of Scotland differs from the Roman law by which a donation, though perfected by delivery, was revocable for ingratitude on the part of the donee during the lifetime of the donor. Stair ² says in every gift there is a corresponding duty of gratitude and therefore by ingratitude the donation becomes void and returns; a rule which the Romans extended only to the donor and not to his heirs nor against the heirs of the donee.

¹Duguid v. Caddel's Trusts, p. 844.
9, Court of Session. 18 B.

²Bk. I, Tit. VIII, sec. 2.

Erskine¹ says donations, though perfected by delivery were revocable by Roman law for ingratitude in the donee. Barkton gives a case to show that the doctrine is received among the Scotch people by usage. Bell² says obligations which are as free gifts voluntarily undertaken, or at least without adequate consideration, are called gratuitous and are effectual. Donations once made otherwise than by last will are not revocable except between spouses.

The Mercantile Law Commission of 1855 recommended that in certain points the Scotch rule should be adopted in England and the English rule in Scotland. In English law contract of sale may include conveyance. The law of Scotland as regards immoveables is founded on the feudal system and thus differs from the law of England. In sale there must be a subject-matter, transfer or agreement to transfer, and a price. The Sale of Goods Act, 1893, has made two changes : (1) contract may pass property irrespective of delivery (secs. 17, 18) ; (2) *action quanti minoris* is recognised to an extent previously unknown in Scotland [sec. 11 (2)].

The Sale of Goods Act, 1893 (sec. 17) enacts that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Blackburn³ says the civil law of sale is founded upon two assumptions : (1) There must be a fixed *price* in money and a contract to part with property. A recompense not consisting of money cannot be a sale. (2) Property cannot be transferred by any agreement unless there be an overt act of delivery of possession. The English law has not accepted these two principles. Pothier⁴ says it is a principle of civil law that as soon as the sale is perfected, the thing sold remains at the risk of the purchaser, though it has not been yet delivered ; and if during that time it perish without

¹*Institutes*, ed. by Ivory, 170-197.
Vol. II, pp. 698-99.

²*Principles*, Vol. I, sec. 64. ⁴*Du Contrat de Vente*, pub.
by M. Dupin, 1835,

³*Contract of Sale*, 1845, pp.

any fault of the vendor, the vendor is freed from the obligation and the purchaser is not on that account freed from his obligation to pay the price. In general the contract of sale is completed as soon as the parties are agreed upon the price for which the thing is sold. If the owner of a thing after having sold it to a first purchaser without delivering it to him, has the dishonesty to sell and deliver it to a second person, the property will be transferred to the second purchaser. The first has a right to bring an action for damages against the vendor for breach of contract, and he cannot take it from the second purchaser who *bona fide* bought it. Thus a creditor of the vendor may seize the thing sold by the owner before it has been handed over to the purchaser, even though the price has been paid for it.

Contract of sale without delivery amounts to a perfect sale under nearly the same circumstances as in English law; it amounts to bargain and sale. In English law bargain and sale transfers the legal property in goods. A perfect sale by the civil law of Rome had no effect upon the property; it was merely a personal contract binding on the vendor only and did not give a right in *rem*.

So long as the vendor is able to pay his debts and has goods, there is no difference between English and Roman law. But when the rights of third persons are in conflict, the difference is great. In 1478¹ it was decided that property could pass without delivery of goods. It was agreed by the Court that if I give to you my goods at York and before you take possession of them, a stranger takes them, you can sue the stranger in trespass; for the gift of the property was in you². In *Wortes v. Clifton*³ Lord Coke points out this very thing as an instance of the difference between civil and common law: "The civil law is that a gift of goods is not good without delivery but it is otherwise in our law." In *Cockrane v. Moore*⁴ an attempted sale of the hired share of a horse was

¹ Y. B. 17, Ed. IV, 1.

² Y. B. 2 Edw. IV, 25.

³ Rolle, R. 61.

⁴ 1890, Q.B.D. 57, C. A.

discussed. By the civil law property in goods did not pass by virtue of a contract of sale until delivery was made. But though property did not pass, as soon as the parties agreed on the subject matter and the price, there was a perfect sale; the result of which was that the risk passed to the buyer, and he acquired *jus ad rem* though not *jus in re*. In Scotland this rule was followed. "The authority of Pothier," says Best, C. J.,¹ "is as high as can be had next to the decision of a court of justice in this country." Lord Blackburn² spoke to the same effect: trust is a species of mandate or of deposit or both. Erskine³ defines trust as "An interest created by the conveyance of property made or assumed to be made by one party (truster) to another (trustee) in order that the latter may carry out the directions, express or implied, of the former respecting its managements and disposal." Erskine adds: trust is not amalgamation of deposit and mandate because depository may not, while a trustee or mandatory must, deal with the thing in question. In Croskery⁴ Inglis, the Lord President, defined trust as 'a contract made up of two nominate contracts of deposit and mandate. The trust funds are deposited for safe custody and the trustees receive a mandate for their administration.' Stair⁵ says trust is amongst mandates or commission. Bell⁶ refers trust to a combination of two contracts, deposit and mandate, the estate not being in the trustee for any use or purpose of his own and management being ruled by directions given by the maker of the trust. Mc'Laren⁷ defines trust as 'an interest created by transfer of property to a trustee in order to carry out the trustee's directions respecting its management and disposal.'

¹In *Cox v. Troy*, 1822, 5 B. and Ald. 481.

²In *M'Lean v. Clydesdale Bank*, 1883, 9 App. ca. 105.

³*Principles*, 20th ed. by Rankine, pp. 522, 523.

⁴1890, 17 R. 700.

⁵*Institutions*, Vol. 1, 118, ed. by More.

⁶*Commentaries*, Vol. 1, p. 70, 7th ed.

⁷*Wills and Successions*, Vol. II, p. 825, 3rd ed.

Scotch law has not got the idea of trust in the English sense of the term ; because the beneficiary has the right to follow the property into whose hands it may come ; and it can be recovered from a person who got it with notice of the trust ; or from a volunteer even without notice. It gives to the beneficiary a right *in rem* over that property. This idea is peculiar to the English system and is not to be found in Scotch law.

RULE II.—Conveyance though valid between the parties can be set aside at the instance of third persons.

Every person who is solvent may effectually give away his property or bind himself to pay a sum gratuitously. Such a transaction can be impeached in two ways : (1) By Statute 1621 (C. 18) by which prior creditors can impeach gratuitous bonds to relatives or friends during insolvency.

(2) On the ground of collusion or fraud. Gratuitous bonds and other obligations rank in competition with claims of creditors without any preference to the latter. Statute 1621. (C. 18) enacts two provisions : (a) against gratuitous alienation or conveyance made in favour of relations and friends in prejudice of creditors, the receiver has to prove that it was not gratuitous. (b) It prevents alienation being made by a debtor of his estate to the prejudice of creditors if he has begun diligence against the estate. In bonds and other deeds securing liquid debts containing a clause of registration and on bills of exchange diligence is summary (*i. e.*, judgment can be signed and execution obtained at once without any action being brought).

In Scotland the rule of sale in market overt does not apply¹. All shops in the city of London are market overt for the purposes of their own trade. When stolen goods are sold in market overt, the property passes to the buyer. In Scotland the property does not pass to the buyer and the true owner can recover it from him.

¹ Sale of Goods Act, 1893, sec. 22; Todd v. Armour, 1882, 9 B. 902.

The Larceny Act 1861¹ enacts that on conviction of the thief the property reverts to the original owner by force of statute².

The object of the Bills of Sale Act was to remedy an evil arising from the Common Law rule of England that a man might take securities without carrying them away or taking possession of them. Lord Blackburn³ said: "At Common Law a man might take a security upon goods without carrying or taking possession of them." Scotland and Ireland were excluded from the operation of these Acts; but similar legislation was applied to Ireland in 1879, 1883.

The existing Acts render an unregistered bill of sale invalid, not only in questions relating to general creditors, or with an execution creditor of the grantor, but also as between successive assignees of the same goods. Such assignees have priority in the order of the registration of their bills of sale. The Bill of Sale Act, 1882, applies only to bills of sale given by way of security for payment of money. The form given in the schedule must be strictly followed. The Sale of Goods Act, 1893, is made applicable to Scotland and property passes irrespective of delivery. The Bill of Sale Act has not been extended to Scotland. The Sale of Goods Act [sec. 64 (4)] excludes from the operation any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

(a) The Scotch Bankruptcy Acts of 1621 (C. 18) and of 1695 (C. 5) and (b) the rule that there must be delivery in order to render valid a transfer of moveables in security of debt are sufficient, and the Bills of Sale Act is not necessary. The Scotch Acts protect creditors against gratuitous alienations and fraudulent transactions by an insolvent; and the necessity for

¹24 and 25 Vict. c. 96, 7 Edw. VII, c. 23, sec. 6.
sec. 100.

²Criminal Appeal Act, 1907, ³In *Cookson v. Swire*, 9 A. C. (H. of L.) p. 664.

delivery prevents creditors from being misled by apparent ownership of the debtor. If there is a real sale, the purchaser in Scotch and English law can claim from general creditors of the seller the goods sold but not delivered. The Sale of Goods Act (sec. 25) protects a buyer, who *bona fide* purchased and obtained delivery of property already sold; this right is given in favour of individual purchasers while general creditors of the seller are not protected from false credit arising from reputed ownership.

Lord Stowell¹ said, "According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the maritime courts of all countries would look. It is a universal instrument of transfer of ships in the usage of all maritime countries, and in no degree a peculiar title or conveyance known only to the law of England. The Merchant Shipping Act, 1894 [sec. 10(4),] embodies the above principle." Bill of Sale
of ship.

There is a Bankruptcy (Scotland) Act by which fraudulent transfers can be impeached by creditors. In this respect English and Scotch law are similar.

C.—DUTY TO DISCLOSE THE NATURE OF CONSIDERATION.

The Statute of Frauds does not apply to Scotland. The Sale of Goods Act (sec. 4) enacts that contract of sale for £10 and more shall be reduced to writing. Mr. Justice Stephen and Sir F. Pollock have criticised the policy. It is a mere weapon of defence, not of offence. It deals with procedure only².

The Bills of Sale Act does not apply to Scotch law. There is a difference between the sale of goods and the sale of heritage in Scotland. The contract may be proved either by writing or by parol. In the sale of heritage the Common Law of Scotland applies.

¹The Sisters, 1806, 5, Robinson Admiralty Reports. ²Law Quarterly Review, p. 1.

As no consideration is required to make binding contracts in Scotch law, there is no need for it to appear in writing. Stair¹ says, instead of the remedy of stipulation, the inconveniences that rejected naked pactions among the Romans were remedied thus: (1) If the matter be of great moment or requires to its perfection solemnity in writ, all such agreements, promises and pactions are accounted imperfect and not obligatory until the writ be subscribed such as dispositions of land and heritable rights. There is *locus paenitentiae* even after agreement, and either party may resile till the writ be subscribed and delivered. (2) All writs of great importance are to be subscribed by the party or by two notaries before four witnesses.²

¹*Institutes*, ed. by More,
Vol. I, p. 96.

²*Bell's Principles*, Vol. I,
s. 26.

CHAPTER XI.

THE DOCTRINE OF CONSIDERATION IN ENGLISH LAW COMPARED WITH THAT OF CAUSE IN FRANCE, BELGIUM, ITALY, PORTUGAL, SPAIN, ARGENTINE REPUBLIC, COLOMBIA, URUGUAY, COSTA RICA AND THE REPUBLIC OF CHILI.

Roman law was studied in the University of Paris in the eleventh century, and a study of the writings of the Middle Ages shows the Roman law was very widely known. The so-called Lo Code composed in 1149 A.D., throws a flood of light on the subject. The Prologue given by Beaumavoir¹ shows that he was trying to introduce Roman law while expounding the law of France between 1256 and 1283 A.D. When the Jesuits got power in France, Roman law began to decline. The *Corpus Juris Civilis* was written by D. Dionysir Gothofredi in 1624. Domat (1625—1695) wrote *Civil Law*; Pothier (1699—1772) wrote *Pandectae Justinianae* (1748—1752). In Gaul the influence of Roman law was great and Justinian's law prevailed in the 12th and 13th centuries. Savigny writes: "It is universally known that, with regard to Roman law, Pothier is the pole star of the modern French jurists, and that his works exercised the most immediate influence upon the code."² Rayward in a note says: "Dupin in his dissertation, *sur la vie et les ouvrages de Pothier* says that 'three-fourths of the Code Civil were literally

¹Beaumavoir *Les Coutumes du Beauvoisis*, Prologue 1842, pp. 11—15.

²*Of the Avocation of Our*

Age for Legislation and Jurisprudence, F. C. Savigny, trans. from the German by Abraham Hayward, 1831, pp. 76-77.

extracted from his treatises,'". Windscheid¹ says that in particular the law of obligations is largely compiled from the writings of Pothier. Feudal and canon law influenced the law of France.

A contract is an Agreement by which one or more persons bind themselves to one or more persons to give, or not to do a certain thing².

France.

*France.*³—In French law every contract must have four elements to make it legally binding: (a) consent of the party who binds himself; (b) capacity to contract; (c) specific object forming the substance of the agreement; (d) a licit cause for the obligation.

Between the English and French doctrine there is a difference in principle because consideration is not required to enforce a contract in French law. The division of English contracts into simple contracts and contracts under seal does not prevail in French law. There is no such thing as deed in French law, in the English sense of the term; title and title-deed mean title and deed in the popular sense.

Belgium. /

Belgium.—Belgium is still governed by the French Civil Code, but has a separate Commercial Code of 1872, based on the French Code de Commerce. The Doctrine of Cause is accepted in the law of Belgium and there is no difference in the law of Belgium and France on this doctrine⁴. The essential of contract are those which are enumerated in the Code Napoleon.

Italy.

*Italy.*⁵—A large part of the Roman Empire was conquered by the Lombards in 568 A.D. and Italy was in turn invaded by them. Charlemagne effected many changes in the law of Italy. But the school of Bologna exercised a very powerful influence in favour of the

¹(Bornhard) *Lehrbuch des Pandektenrechts*, 3 vols. 1875-1878.

²*French Civil Code*, sec. 1101.

³*French Civil Code*, s. 1108, *Code Civil*, Book III, Tit. 3,

s 4; 1 Pothier *Tr. on Obligations*, P. 1, c. 1, s.1; art. 3, s. 4.

⁴*Belgian Law*, by Ernest Todd, 1905, p. 125.

⁵*Italian Civil Code*, by Massoni Doreto *Civile Italianit.*

revival of Roman law. The Civil Code of Italy was passed in 1867 and was based on the Code Napoleon and the Italian Commercial Code is based on the French Code de Commerce. The Doctrine of Cause is embodied in Italian civil law. Conditions essential to the validity of a contract are: (1) capacity to contract; (2) valid consent of the contracting parties; (3) a determinate object capable of being the subject of an agreement; (4) consideration or cause must be lawful (sec. 1104). Contracts are verbal or written.

*Portugal.*¹—Portugal has a Civil Code which was passed in 1867 and a Commercial Code dating from 1888. There is a Doctrine of Cause for the validity of contracts.

*Spain.*²—The law of Spain was greatly influenced by Roman law. It was never received as the law of Spain by any Act of Legislature. Indeed there was a great protest against the use of Roman law in Spain, but the lawyers applied the principles in arguing cases, owing to the merits of that system. The Institutes of the civil law of Spain by Assi and Manuel state that Roman law has no authority and that Spanish law is not dependent upon it. It is referred to in cases where Spanish law is silent. The word Common Law refers to the Civil law; it does not mean all Spanish Civil law, but only that part of legislation which is enacted by the Spanish Civil Code and Supplementary Laws.

¹*The Cambridge Modern History*, Vol. X, ch. X (II); *Republic of Portugal since 1910*; *Story of the Nations Portugal* by H. Morse Stephens; *History of Spain and Portugal* by Durham in *Lardner's Cabinet Cyclopaedia*, between 1832 and 1843; *Documents: Collecção de Livros ineditos de Historia Portugueza*, edited by Correa da Serra; *Collecção dos Principaes Auctores da Historia Portugueza*.

²*Commercial Laws of the World*, trans. by William A.

Bewes, Vol. XXXII: (1) *Bills of Exchange*; and (2) *Contracts*, by Bonito Lorenzo; *Codigo do Commercio*, by Ministerio de Ultramar, ed. of Madrid, 1888; *Institutes of Civil Law of Spain*, trans. by Lewis F. C. Johnson, London, 1825; Bourne E. G. *Spain in America, 1450-1580*, New York; Clarke H. B. *Modern Spain, 1815-1898*, Cambridge 1906; Hume M. A. S., *Spain, its greatness and decay, 1479-1788*, Cambridge, 1898.

The Spanish Civil Code came into force in 1831. It is based on the Code Napoleon, Book IV, Tits. I, II; Tit. XVI, ch. 2, deals with the subject of obligations. The Code of Commerce now in force was published on August 22nd, 1885. The law relating to bills of exchange and promissory notes is also enacted.

Obligation consists in giving, doing or not doing something, and is completed by consent. In onerous contracts *causa* consists in rendering or promising to render service by one party to the other. In remunerative contracts *causa* consists in service or profit which is rendered; while in contracts of beneficence, *causa* consists in liberality. Contract must have: (1) consent of contractors; (2) certain object which is subject-matter of the contract; (3) *causa* of the obligation which occasions it. Every contract consists of offer and acceptance respecting the thing and the *causa* which are essential elements.

Argentine Republic.

*Argentine Republic.*¹—The territory now known as the Argentine Republic declared its independence of Spain, 9th July 1816. It has a Civil Code of 1869 based on French Civil Code and a Commercial Code of 5th October, 1889, based on the Brazilian Code of 1850, which has taken German law as its model. The Doctrine of Cause is accepted. There is a distinction between merchants and non-merchants in the Commercial Code. In order to derive benefit of the Code de Commerce the merchant must be registered at the Tribunal of Commerce and he gets certain advantages which are denied to others.

The South American States.

*The South American States.*²—The South American States have Codes based on French law. *Colombia* has a Civil Code, sanctioned 26th May, 1873; and a Commercial Code, sanctioned 12th October 1869.

¹ *Commercial Laws of the World*, Vol. 1; *Usualles de la Republica Argentina*, by Codigos J. Leyes, 1901; *Metricula Commerco* by Charlos J.

Duran, 1908.

² *Commercial Laws of the World*, Vol. 1; Uruguay, Costa Rica, Republic of Chili, Vol II, Colombia.

Uruguay—has a Civil Code which came into force in 1879.

Costa Rica—has a Civil Code dating from 1887.

The *Republic of Chili*—has a Civil Code of 1857.

In all these States the Doctrine of *Causa* prevails.

A —RULES IN THE DOCTRINE OF CAUSE IN THE LAW OF CONTRACT.

RULE I.—A cause is required in order to make a contract binding between the parties to it.

An obligation without “ cause ” or with a wrong cause cannot produce any effect. (French Civil Code, sec. 1131.) An agreement is none the less valid, though the consideration therefore may not be expressed¹. Mr. Blackwood Wright² says in contracts for valuable consideration a ‘ *titre onerux* ’ seems to be the same as consideration in English law. *Causa* seems to be what the law treats as the motive for the contract, which makes it binding, *viz.*, either the mutual promises if the contract is executory entirely, or the thing done by the one party if it is partly executed or natural affection in the case of a donation. By a false cause is understood a fundamental mistake. In Toullior’s *Commentary on French Codes*³ it is stated that there can be no effect without a cause and obligations are no exception to the rule. If there is no cause, but bare agreement, the fact was nude and an action could not be brought against a Roman citizen ; where the cause was present, obligation arose and obligation could be sued upon.⁴ The cause of an obligation *ex contractu* is that which renders the contract valid and may be the form or nature of the contract or some fact on which it depends or arising out of what

¹ *Commercial Codes*, Art Charles Bonaventure, M.
110, 137, 138. Toullior, Paris, 1839-43.

² *Commentary on French Civil Code.* ⁴ *Mayns Elements de Droit Romain*, Vol. II, sec. 207, p.

³ *La Droit Civil Francais*, 191, deux. ed., 3 vols, 1856-74.

is done or promised on either side. In stipulation the cause consisted in question and answer ; in *litteris* contract entry in books was the cause ; in consensual contract cause consisted in mutual agreement ; in contract *re* cause consisted in delivery of a thing. In English Common Law in covenant cause was seal and delivery of the deed ; in obligation to pay creditor, cause was debt. Hence cause is a general term which may coincide with but is not equivalent to consideration. Desquiron¹ says cause is the immediate *motif* which determines the party to contract ; *motif* means the moving force or power quite distinct from motives which actuate the party. Pothier² says : " Every contract ought to have a just cause. In contracts of mutual interest the cause is the thing given or done or engaged to be given or done or the risk incurred by the other party. In contracts of donation the liberality which one party exercises towards the other is sufficient cause for the engagement contracted in his favour. But where an engagement has no cause or, what is the same thing, where the cause for which it is contracted is false, the engagement is null and so is the contract which concludes it." If owing to an assumption of the falsity of which I am not apprized, I engage to give you a certain estate in discharge of a legacy, the contract is null because the cause of my engagement is false ; therefore, even if I have delivered it, I am entitled to reclaim it, by *actio condictio sine causa*. The meaning of the word cause is not defined as a legal term of art, but commentators describe it as an efficient and impulsive ground.³ The word 'cause' seems to be wider than the English term consideration, because it includes natural and moral obligation. Demolombe⁴ says the deliberative

¹*Esprit des Institutes de Justinian conféré avec le Code Napoleon*, Vol. II., Lib. III, Tit. III, ch. II, p. 315 (1807). 2 vols.

²*Obligations*, sec. 42.

³Demolombe, *Cours du Code Napoleon*, Tome XXIV, p. 329.

⁴*Traité de Contracts ou des Obligations*, Tome XXIV, p. 335, pub. 1870.

intention to bestow gratuitous benefit is sufficient cause to constitute a binding unilateral promise.

It has a narrower meaning because the words 'sans cause' correspond in English law to total failure of consideration and not mere absence of consideration¹.

Belgium.—Belgium has accepted the meaning of Belgium. cause as given by French jurists.

Italy.—A contract without a cause is invalid (sec. Italy. 1119).

Portugal.—The Portuguese Civil Code requires a Portugal. cause to make a contract binding.

Spain.—Spanish law enacts that a contract without Spain. cause is void. If a false cause is stated in a contract, it shall render the contract void, unless it be proved that there was other lawful cause for its basis.

Other States.—The Argentine Republic Civil Code Other States. requires every contract to have a cause to create a legal obligation. The South American States of Colombia, Uruguay, Costa Rica and the Republic of Chili require cause to make a contract legally binding. Thus while in England valuable consideration is required to give validity to every simple contract, on the Continent of Europe and in the States of South America cause is required; and the meaning is wider and broader. It includes motive and moral consideration is a good cause to make a contract binding.

Characteristics of negotiable instruments in English and French system of law.

The English theory, writes Chalmers², is called the Negotiable banking credit system as contrasted with the mercantile Instruments. theory of French law. A bill of exchange in its origin was an instrument by which a trade debt due in one place could be transferred to another. It was intended to do away with the necessity of sending cash from one

¹*Traite de Contracts on des obligations*, Tome XXIV, p.342.

²*Bills of Exchange* (7th ed.) Introduction, XI to XIII.

place to another. French Mercantile Law has this object in view ; while English Mercantile Law regards bills as instruments of credit to pass from hand to hand. In French law a bill indicates a trade transaction, while in English law it represents an instrument of credit. In English law the system of accommodating bills is fully recognised while in French law it is not favoured.

- (a) In English law consideration is presumed in negotiable instruments and it is not necessary to express it ; while in French law the nature of value must be expressed in the bill, and if it is falsely stated, the bill is void in the hands of all persons who took it with notice.
- (b) In English law a bill may be drawn and payable in the same place. In Comyn's *Digest* it is stated that it was not allowed formerly, while in French law the place where the bill is drawn must be so distant from the place where it is made payable that some rate of exchange is possible between the two places. A false statement of places avoids the bill in the hand of a holder with notice. A bill of exchange presupposes a contract of exchange.
- (c) In English law a bill may be drawn payable to bearer or order ; but in French law a bill must be payable to *order*.
- (d) A bill in English law may originally be made payable to order and may become payable to bearer at a subsequent stage when endorsed in blank ; in French law an endorsement in blank means 'procuration'. To make it negotiable, endorsement must be to order and must contain consideration on the face of it.
- (e) In English law if a bill be refused acceptance, the holder can sue at once ; but in French law he cannot, because it must be refused at maturity also ; the holder may require security from the drawer and endorsers.

(f) In English law a distinction prevails between current and overdue bills, but not in French law.

(g) An inland bill is not required to be protested in English law. Notice of dishonour is quite sufficient; but in French law every bill which is dishonoured must be protested whether inland or not.

The law of 7th June, 1894, enacts that a Bill of Exchange may be drawn in one place upon another or in different parts of the same place. It must contain date, amount to be paid, name of the person required to pay, time when, and place where payment must be effected; it may be to the order of a third person or to the order of the drawer himself.

Endorsement must be dated and value given must be stated. It must set out the name of the party to whose order it is endorsed. If the endorsement is not in order as required by law, it will not operate as a transfer, but as a power of attorney. This is called irregular endorsement. In French law a Bill of Exchange may be proved by notarial deed.

Belgium.—Belgium has adopted the mercantile Belgium theory of negotiable instruments. The object of a bill is to pass one debt from one place to another. The instrument must contain the statement of value on the face of it¹. A bill must contain: (1) amount payable; (2) name of the person liable to pay; (3) the date and place of payment; (4) the name of drawee, being either a third person or the drawer himself.

Italy.—Italy has adopted the French mercantile Italy theory on bills of exchange and promissory notes.

Portugal.—Portugal has also adopted the French Portugal mercantile system in bills of exchange.

¹Bills of Exchange and Promissory Notes Law of 20th May 1872.

Spain.

Spain—In Spanish law a bill of exchange is considered a mercantile act; all rights and rights of action originated by it are governed by the provisions of the Code without distinction of persons. If the terms 'value in account' and 'value understood' are used in a bill, the taker of a bill becomes liable to the drawer for the amount stated in it for the purposes of demand or set off, as when both have agreed at making the contract of exchange. If the bill of exchange has any defect for want of legal formality, it shall be regarded as a promissory note in favour of the taker and at the expense of the drawer. The French mercantile system is adopted.

Other States.

Other States.—The Argentine Republic Commercial Code enacts that in negotiable instruments and promissory notes the absence of statement of *causa* or a statement of a false *causa* in obligations transferred by endorsement cannot be any defence against a third person who becomes a *bona fide* holder¹. The influence of German law is found in Bills of Exchange. In the South American States, Colombia, Uruguay, Costa Rica and the Republic of Chili a bill of exchange is regarded as an instrument of credit.

In English law, bills of exchange and promissory notes are instruments of credit; consideration is presumed and a *bona fide* holder for value has a right to enforce payment. This idea is not fully formed in French law, and those States that have adopted that mercantile theory. In recent Codes we find that system ignored and the banking system is adopted.

RULE II.—A cause consists in deliberate agreement between the parties to it for any reasonable ground.

In French law, cause is what the law treats as the motive for the contract, which makes it binding.

In Belgian law, contract is not treated as a bargain having in view any pecuniary advantage.

¹*Commercial Laws of the World, Vol. I, p. 786.*

In Italian, Portuguese and Spanish law a similar view is taken.

In the Argentine Republic and in the South American States of Colombia, Uruguay, Costa Rica and the Republic of Chili a similar view is adopted.

In English law the promisee must have incurred some legal detriment, either by relinquishing some legal right or incurring some legal liability by relying on the promise of the promisor and at his request. This requirement is not insisted on in the law of the countries stated above.

RULE III.—Contracts generally have no effect except between the contracting parties. They cannot affect a third party's rights and a third party cannot take advantage of them. Exception¹:—

(1) *France*—A person may stipulate for the benefit of a third party, when it is a term of that stipulation that he makes for himself or is a condition of donation which is made to another. The person who has made such stipulation cannot revoke it, when the third party has stated he wishes to take advantage of it².

Law of 8th December 1904 prohibits in France insurance on lives of children under 12 years of age.

(2) Creditors are entitled to take advantage of all rights and rights of action of debtor except those which are purely personal³. Creditors can sue in their own names to have acts done by the debtor defrauding their rights annulled⁴.

Pothier⁵ says: "When I stipulate with you for a third person the agreement is void; for by this agreement you do not contract any obligation in favour either of such third person or myself. It is evident that you do not contract anything in favour of the third person for

¹ *French Civil Code*, sec. 1165.

² *Ibid.* sec. 1121.

³ *Ibid.* sec. 1166.

⁴ *Ibid.* sec. 1167.

⁵ *Obligations* (1806), Vol. I, sec. 54, p. 33.

it is a principle that agreements have no force except between the parties who contract and consequently they cannot acquire any right to a third person who is not a party to them. By this agreement you do not contract any civil obligation in my favour; for what I have stipulated in favour of the third person, not being anything in which I have an interest of pecuniary appreciation, no damages can result to me from a failure in the performance of your promise and therefore you may with impunity fail to carry out the promise." He adds that "if I stipulate in my name that a person shall do something for another without having, either before or at the time of the agreement, any personal interest that it shall be done, this is really to stipulate for another, and such an agreement is not valid in law."

This doctrine arose out of a mistaken view of the Roman rule of stipulation. A contract between X and Y as a rule cannot give Z any right of action; but the maxim *Alteri stipulari non potest* is used in French jurisprudence as meaning that if X gives a promise to Y to do something for Z that does not give any right of action to either of them. In French law as a rule when a person makes a contract in his own name, he can only bind himself and stipulate for himself¹. The words *s'engage* in French law mean a person who contracts an obligation; *stipular* is a person in whose favour the obligation is entered into.

Belgium.

Belgium.—In Belgian law a contract produces an effect between the contracting parties but, (a) if the party has expressly stipulated for the benefit of some third person and that is a term of the contract, he will be bound; (b) creditors can take advantage of all rights of the debtor excepting purely personal rights. Creditors can sue in their own names to have the acts done by the debtor to defraud them cancelled.

Italy and
Portugal.

Italy and Portugal.—Italian and Portuguese law has a similar rule based on French law.

¹ *Civil Code*, sec. 1119.

Spain.—In Spanish law if stipulation is made in Spain. favour of a third person, it will be valid and enforceable if that party wishes to take advantage of it. Creditors can take advantage of rights of action credited in favour of debtor excepting personal rights.

Other States.—The Argentine Republic Civil Code Other States requires that the contract made in favour of a third person must be accepted before the contracting parties agree to withdraw from the contract.

The South American Republican States of Colombia, Uruguay, Costa Rica and Chili have a similar rule.

In English law no stranger to the contract can enforce it. Even the relationship of blood is no ground for an exception. The countries above named allow the two exceptions mentioned.

RULE IV.—The Act or Forbearance constituting a *Causa* must be of some legal value. Inadequacy is a valid ground for rescinding a Contract.

France—Pothier¹ says: "As equity in matters of commerce consists in equality, when that equality is violated the contract is vicious for want of the equality which ought to preside in it." The French Civil Code (secs. 1674-1685) deals with the contracts of sale. This law is based on the Roman law that a sale for less than half the true value may be set aside in favour of the seller unless the purchaser elects to make up the deficiency in the purchase money².

Modern French law enacts that if the vendor has suffered a loss of more than seven-twelfths of the price of a piece of real estate, he has the right to apply for rescission of the sale even if he has expressly renounced in the contract the right to ask for such rescission and has declared that he abandoned any increase in the value³. The seller must raise a general presumption of

¹*Obligation*, sec. 33.

²*Code* 4, 44.

³*French Civil Code*, sec. 1674.

under-value before he can show that he received less than seven-twelfths of the real value. The buyer may pay up the difference, otherwise the seller can rescind the contract.

Rescission on account of lesion does not take place in contracts of exchange¹. Pothier says this rule does not apply to sales of reversionary interests because of the difficulty of fixing the price, nor to sales of moveables or court sales. Rescission is granted for under-value without undue influence or fraud being proved because undervalue to the extent of seven-twelfths shows that the parties were never agreed. The law assumes fundamental error or mistake going to the root of the contract. It is an action for damage sustained by the seller. The buyer has no similar right in French law if he gives more than seven-twelfths of the value. The true price is the market price without looking to the peculiar circumstances of the parties. The French Code of Procedure (Art. 302) enacts that valuation by an expert can be made only after the order of the Court. Laurent² says the practice is that the Court may non suit the plaintiff if it comes to the conclusion that no reasonable grounds for interference have been shown although the facts stated by the plaintiff are quite true.

Belgian
Code.

Belgian Cod.—A contract can be set aside for inadequacy of value. In the law of sale the *vendor* has a right to apply to the Court to rescind a sale if he has received less than a fixed amount of the price of real estate.

Italy.

Italian Code.—In Italian law the inadequacy of cause vitiates agreements in certain cases³. These provisions resemble those of the French Civil Code. The vendor can rescind a contract of sale if he receives less than seven-twelfths of the price of real estate. This right is restricted to contracts of sale only.

¹*French Civil Code*, sec 1706.

²Vol. XXIV, par. 436.

³*Italian Civil Code*, secs. 1529-1537.

Portugal and Spain.—In Portuguese law if inadequacy is beyond a certain limit the Court will not enforce the contract. Portugal
and Spain.

In Spanish law a contract cannot be rescinded on the ground of *laesio* except in two cases: (1) where a contract is made by a guardian without obtaining the consent of the family council, and injury is suffered by the persons whom he represents to the extent of more than one-fourth of the value of the things which have been the subject of the contract; (2) if a contract is made for an absent person and it results in injury to the extent of more than one-fourth of the value of the subject of the contract.

This right to rescind is subsidiary and is allowed if it is the only way of getting redress¹. This rule is a modification of French law. This right to set aside a contract on the ground of inadequacy is not confined to contracts of sale only.

Other States —In the Argentine Republic adequacy of cause is not insisted upon. If the inadequacy is so gross as to be unconscionable, the contract will be set aside. In commercial transactions if the parties are agreed upon the price, it will be a valid contract. This is also the rule of English law². Other
States.

The South American Republican States of Colombia, Uruguay, Costa Rica and Chili follow the English rule and depart from the rule of French law³.

The rule of *laesio enormis* is derived from Roman law. It was adopted in the Code Napoleon and other States copied it. In English law mere inadequacy of value is no ground to set aside a contract if the parties are genuinely agreed; but if there is any suspicion of fraud or imposition, the inadequacy of consideration will be taken into account in finding out the real intention of the parties.

¹ *Commercial Laws of the World*, Vol. XXXII, p. 312.

² *Ibid.* Vol. I, p. 217.

³ *Ibid.* Vol. II, 305.

RULE V.—The object of obligation must be definite, legal, possible and not contrary to public policy.

In French law an obligation with a wrong cause or with an illicit cause cannot produce an effect¹. The cause is unlawful when it is prohibited by law or when it is contrary to morality or to public order².

No action lies in respect of a gaming debt or in respect of a bet. Sports calculated to give skill in arms, foot and horse races, tennis and other similar games which have the effect of giving skill and exercise to the body are excepted. The Court may, however, non-suit the plaintiff when the claim appears excessive³. In no case has the loser a right of action to recover what he has voluntarily paid unless the winner has been guilty of fraud, trick or theft⁴.

Gaming means games of chance, *e.g.*, dice, cards. Domat⁵ says games of hazard which may cause in a short time the ruin of families are absolutely prohibited. Bonds and obligations contracted on account of play are void absolutely. Aleatory contract consists in mutual agreement, the effect of which depends on an uncertain event in respect of gains and losses dependent on the will of one or both parties; loans both on wagers and betting are instances. These are governed by the Commercial Code of France⁶. The statutes of 28th March 1885 and 12th March 1900 deal with abuses committed in respect of sale on credit of Stock Exchange Securities.

Failure of Consideration.

In French law *sans causa* means consideration which has failed. Falsity of consideration is called 'false cause,' which renders the contract invalid, *e.g.*, consideration may be based on mistake. If it is based on a mistake of law or of fact it is *causa turpis* or illegal

¹*French Civil Code*; sec. 1131.

²*Ibid.* sec. 1133.

³*Ibid.*, sec.

⁴*Ibid.* 1967,

⁵*Civil Law*, Vol. II, Bk. III, Tit. 12, par. 2.

⁶*Commercial Laws of the World*, Vol. XXI, p. 311.

consideration and is fatal to a contract. In English law failure of consideration and its unreality due to error invalidate a contract when the parties expressly make it a condition of the contract. In sale there is an implied condition that the chattel exists at the time of the contract¹. When a person has paid a debt by mistake, either of law or of fact, it can be recovered. In English law if payment is made by mistake of law, it cannot be recovered. When a specific thing which formed the subject-matter of the obligation perishes and becomes impossible, the obligation is extinguished if the thing has perished without fault of obligor².

Every contract presupposes something due. What has been paid without being due can be recovered. Payments cannot be recovered when they are in respect of natural obligations which have been voluntarily³ paid. Payment in French law means every obligation which consists in either giving or doing what it has been promised to give or do⁴. Natural obligation is a duty which is legal in the sense that it is *per se* capable of being enforced, but in respect of which the law gives no right of action. There must be a legal link between the persons but a link which the law refuses to recognise. An obligor who is under an alternative obligation is discharged by the delivery of one of two things which were included in the obligation. The choice belongs to the obligor unless it has been conferred upon the obligee.

Belgium.—In Belgian law if the cause be false or Belgium. contrary to law or good morals, or opposed to public policy, the agreement cannot be binding.

Wagering contracts are invalid; anything paid to wage a contract cannot be recovered.

¹ Baudry *Lacantinerie Obligations*, secs. 295—327.

² *Ibid.*, sec. 1377.

³ *French Civil Code*, sec. 1235

⁴ Laurent, Vol. XVII, para. 476.

Italy.

Italy.—In Italian law a contract founded on an illusory or illegal cause is invalid (S. 1119). The cause is illegal when it is contrary to law, good morals, or to public opinion (S. 1122).

Gaming and wagering contracts are invalid.

Portugal.

Portugal.—In Portuguese law the object of a contract must not be unlawful. An object is unlawful when it is immoral or opposed to public policy.

Gaming and wagering contracts are unlawful.

Spain.

Spain.—In Spanish law a contract with an unlawful or impossible cause is void. A *causa* is unlawful when it is opposed to law or morality.

If the act in which *turpis causa* arises does not amount to a crime: *i.e.*, (a) if both parties to the contract are in *turpis causa*, what is given cannot be recovered or what is promised to be given can be demanded; (b) if one of the parties is at fault, he cannot sue for what he has given under the contract; (c) a third party who was ignorant of the bad *causa* may reclaim what he has given but shall not be obliged to perform what he has offered. If the contract is to render things in the alternative, the obligor has the option to perform one of them entirely; the creditor is not bound to accept part of one and part of another. The debtor has the right to elect unless it is otherwise agreed. But the debtor cannot elect an impossible or unlawful alternative. *Fuero Jusso* (Law I. Tit. III. Bk. XII) enacts that if a trader or overseer sells gold or silver to a man in our kingdom or cloth or garments or other things, if the things were bought lawfully and paid for, although proceeding from a theft, the purchaser will not be liable to an action even if theft be proved. Law VIII, Tit. II., Bk. VII, enacts that if anyone buys stolen goods although in ignorance of its origin, he must return it to the owner thereof; and if he bought them knowing them to be stolen, he shall be regarded as a thief. In the old law if stolen things were sold by merchants, they were not to be returned to the owner if there was no complicity in the crime. The Spanish

Code of Commerce (1885, sec. 85) enacts that things bought in a warehouse or shop open to the public are not recoverable¹.

Other States.—In the Argentine Republic if the object is unlawful and immoral, the contract is void. Transactions which under any form whatever involve gaming or wagering are forbidden, and any action will not be permitted at law to recover anything won. Other States.

The agreement to pay the difference between the price on the contract and settling day is a wagering contract when both parties do not intend to make a real bargain. A gaming contract for differences in exchange is unlawful.² The technical name for such speculation for the rise and fall of market is *juegos de Bolsa*.

In the South American Republican States of Colombia, Uruguay, Costa Rica and Chili the object of contract must be lawful, certain, possible and not opposed to policy of law.

Wagers are unlawful. Speculation on the rise and fall of markets is forbidden; money paid in bets cannot be recovered.

The heads of illegality are similar in English law and in the law of the States mentioned above.

Money paid for a false cause can be recovered if the unlawful object is not carried out and parties are not in *pari delicto*. The law of wager is similar; the speculation in the rise and fall of market prices is unlawful.

RULE VI.—The cause may consist in a motive to return a benefit done on a past occasion.

In English law motive is not the same thing as consideration. Any cause is not equivalent to consideration, e.g., a past consideration is not recognised to create a binding obligation; but it is a good cause in French law. Any motive or inducement to enter into

¹Commercial Law of the World, Vol. XXII, p. 311.

²Argentine Code, c. II, 70.

contract is a sufficient cause. *The mere fact of giving a promise* creates a moral obligation to perform it and creates a legal contract in French law but not in English law¹.

In Belgian, Italian, Portuguese and Spanish law the word cause includes motive also; the mere fact of giving a promise creates a moral obligation to perform it. In the Argentine Republic and Colombia, Uruguay, Costa Rica and Chili the word cause includes motive also.

In English law motive is not the same thing as consideration moving from the promisee. The mere motive to return a benefit already rendered is not valuable consideration at all.

RULE VII.—The forbearance to exercise a doubtful right or abandonment of an honest claim is a good cause for promise.

France.

France—Domat² says a compromise is a covenant which persons, who have a law suit or difference with one another, name arbitrators to decide the matter; such abandonment of a right to sue is a good cause.

The peculiar rule of English law that payment of a smaller sum cannot discharge a debt for a larger amount is not accepted in French law. The word *paiement* includes discharge of any obligation by actual performance. All payment presupposes a debt. Payment which has been made without being due may be demanded back. The demand is not allowed in the case of moral obligation which has been voluntarily discharged. A Decree of 1st July, 1809, relates to amounts which are kept back in trade under the name of payment, with bags thrown in (*passe de sacs*); the Commercial Code (Law of 12th August, 1870) deals with currency matters.

¹French Civil Code Art. 1131.

²Civil Law, Vol. 1, Bk. I, Tit. 14, sec. 1.

Voluntary return of the original document of title in the form of a private agreement by the creditor to debtor is proof of release.

Other States—In Belgian, Italian, Portuguese and Other Spanish law, a contract can be discharged by payment of a smaller sum in satisfaction of a larger amount if the creditor consents. States.

In the Argentine Republic, Colombia, Uruguay, Costa Rica, and Chili, obligation can be released by a bare agreement.

The peculiar technical rule of English law that release requires a valuable consideration or agreement under seal is not accepted in any of the above States. Forbearance to exercise a doubtful right or abandonment of an honest claim is a good cause for the promise in English law also.

RULE VIII.—Compromise of a dispute is a contract with a valid cause.

France.—A compromise is a contract by which the parties put an end to a dispute which has arisen or prevent a dispute which is about to arise. A contract of compromise must be in writing¹. France.

The definition is incomplete because it does not state that each party makes a concession. It must be in writing irrespective of the amount in dispute.

Compromises as between the parties have the effect of *res judicata*. Compromises cannot be impugned on the ground of a mistake of law or undervalue².

Other States—In Belgian, Italian, Portuguese and Other Spanish law compromise of a dispute is a valid cause. Each party agrees to forego some right, real or supposed. But that contract is not required to be in writing, as in French law. In the Argentine Republic a *bona fide* dispute can be compromised. In States.

¹*French Civil Code*, sec. 2044.

²Art. 2052.

Mercantile contracts an insolvent person can enter into compromise with his creditor to pay a part in lieu of the whole claim. In Colombia, Uruguay, Costa Rica and Chili a similar rule prevails.

English law is similar. There is no requirement of a writing as in French law. There must be an honest dispute which the parties desire to compromise. There must be no fraud or imposition to make the compromise binding. There must be full disclosure and freedom to enter into compromise.

RULE IX.—A promise given with a view to compensate for an injury done in the past is enforceable.

In French, Belgian, Italian, Portuguese and Spanish law an antecedent act, forbearance or promise of one party to the other is a good cause for a subsequent promise of the other.

In the Argentine Republic,¹ Colombia, Uruguay, Costa Rica, and Chili² any subsequent promise to pay for an antecedent act or forbearance is regarded as good cause.

In English rule consideration must be present or future but not past. A mere courtesy will support a promise if it is seriously meant to create a binding contract in the law of the above States. Cause need not move from the promisee. A pious respect for the wishes of the testator will be a good cause to make the promise binding on the executor. *Thomas v. Thomas* shows that in early cases cause and consideration were regarded as equivalent. The remarks of Lord Mansfield that 'when the consideration is originally beneficial to the party promising, yet if he be protected from liability by some provision of law meant for his benefit, he may renounce that advantage and promise to pay the debt which an honest man ought to do' are truly applicable in the law of the above States.

¹ *Commercial Laws of the World*, Vol. I, p. 213.

² *Commercial Laws of the World*, Vol. II, p. 116.

³ 1842, 2 Q. B. 851.

A moral consideration is valid and binding in every case without exception. This English rule is supported on the ground of tacit undertaking to pay for what is done and not on the ground of moral obligation¹.

RULE X.—Mutual promises are not binding until something is done in pursuance of the promise.

France—In French law marriage cannot take place where there is no contract². Community of goods obtains between the spouses in the absence of any contract. The contract must be reduced to writing in the presence of a notary before the marriage takes place³. The terms of matrimonial contract cannot be altered after marriage⁴. The Civil Code, Bk. III, Tit. 5, ch. 2, deals with community of goods between the spouses.

In *Queen v. Millins* (1844), 10 Cl. and Fin. 534, it was held that the ecclesiastical law of England required the presence of a clergyman at a marriage. In English law formalities of marriage are regulated by marriage Acts. The form of ceremony depends on the place where marriage is solemnised; while the capacity of parties to marry depends on the law of the domicile⁵. There is no action allowed for breach of promise of marriage, for marriage is not a civil contract. A promise to give in pursuance of the marriage taking place between the intending spouses is valid and binding.

Other States —In Belgian, Italian, and Spanish law a jurisdiction of promise to marry is treated as falling within the ecclesiastical court. There is a system of community of goods between the spouses; the parties can make ante-nuptial agreements defining their rights under it. Such an instrument must be drawn up before a notary and witnesses.

¹Pollock, *Contracts*, 190.

⁴*Ibid.* sec. 1395.

²*Civil Code*, sec. 63

⁵*Brook v. Brook* (1861) 9

³*Civil Code*, Arts. 1387, 1394.

H.L. 193.

In Portuguese law mutual promises are binding. The promise of one party is sufficient to support the promise of the other.

In the Argentine Republic, Colombia, Uruguay, Costa Rica and Chili the system of community of goods prevails between the spouses.

Any promise made to give by a third person, in consideration of marriage taking place between the intended spouses, is valid.

RULE XI.—There is no instrument in the nature of a deed ; all instruments require cause for their validity.

France.

France.—In French law there is no such thing as contract under seal. Contracts are verbal and written; cause is essential to make a contract of any kind binding.

The peculiarity of French law is in procedure ; and the French jurists have fortified the law of proof so as to safeguard the interests of contracting parties. The English doctrine has developed in substantive right while the French doctrine has developed in the notarial system which is peculiar to the law of France. Its leading principle is to give ample opportunity to contracting parties before any legal obligation can arise ; the notaries are required to draw up the documents and there is no chance of any party being deceived.

A person who demands the performance of an obligation must prove it. The rules which govern proof are : (1) documentary evidence ; (2) proof by witnesses ; (3) presumption ; (4) admission ; (5) oath.

A notarial document is one which is drawn up by a public notary having the right to draw up document in the place where the document is, with required formalities. If the notary is incompetent, or there is any defect, it is treated as a private document, if the parties have signed it. A notarial document is sufficient evidence of the agreement ; such a document

is evidence between the parties : recitals having bearing on the operative part are treated as conclusive evidence of the matter, if the recitals do not form part of the operative part, they are rebuttable evidence of the contents.

A document in the form of a private agreement which is admitted by the person has the same effect as a notarial document¹. The person against whom a document in the form of a private agreement is set up is required to admit or deny the writing, or signature, or both ; if he denies, the Court will order to have it verified.

The books of traders are not evidence against non-traders in respect to goods entered therein². But such books are evidence against them .

Tallies which correspond with their counterparts are evidence between customers.

Documents may be executed before notaries in the form of agreements relating to all matters exceeding 150 francs, even in the case of voluntary deposits ; and no evidence by witnesses is admitted to contradict, add to, or vary the contents of the document.

The above rule does not apply to commercial transactions³.

An oath is another way of proving a contract⁴.

Every obligation to do or not to do gives rise to an action for damages in the event of the obligor not performing his part of the contract.

Belgium.—The law of Belgium has no instrument in Belgium the nature of a deed. Contracts are verbal or written. There must be a cause for every contract, no matter if it be oral or written. The peculiarity of the law of Belgium is its procedure. The law of proof is very strict.

¹ Commercial Code, sec. 109. 39, 49, 109, 273, 202, 311, 332.

² *Ibid*, Art. 8.

⁴ *Ibid*, Art. 189.

³ Commercial Code Arts.

There is a system of notarial documents, with a view to secure publicity to transactions. The written documents cannot be varied by oral evidence.

Other
States.

Other States—In Italy documents are drawn up by a notary who is an officer of the court. These matters are regulated by the Commercial Code of Italy. Tallies are admissible in evidence between traders and their customers. There is no instrument resembling the deed in English law.

In Portuguese law there is no instrument in the nature of a deed. Every instrument must have a cause. There are notarial instruments which require to be drawn up by a notary and signed by the parties.

In Spanish law contracts are divided into written or oral. They must have a cause. Some acts and contracts are required to be drawn before a notary. A Royal Decree of 21st December, 1885, enacts that traders shall keep a mercantile register and an entry of transactions must be made. There is no instrument in the nature of a deed.

In the Argentine Republic there is no instrument in the nature of a deed. Every instrument must have a valid cause. Commercial contracts may be proved : (1) by notarial instruments, (2) notes made by brokers and certified extracts of notes, (3) by private document signed by the contracting parties or their agents.

In Colombia, Uruguay, Costa Rica and Chili there is no instrument in the nature of a deed. Notarial instruments are generally used.

The deed is peculiar to the law of England. Owing to the solemnity of the deed English law dispenses with the requirement of valuable consideration.

In the States mentioned above the notarial system takes the place of the deed.

B.—THE DOCTRINE OF CAUSE AS IT AFFECTS THE LAW OF PROPERTY AND CONVEYANCING.

RULE I.—The presence or absence of a cause affects the legal nature of the transaction.

France—In French law every gift must be in the form of a contract executed before notaries so as to preserve evidence of the transaction.¹ Every instrument purporting to be a gift *inter vivos* must be drawn up by a notary in the form of a contract and a record thereof must be kept in the notary's archives otherwise such instrument will be null and void.

In English law it must be completed by : (a) delivery, or (b) by deed, or (c) by declaration of trust.

In French law there are restrictions on the power of disposition by gift but not in English law as a general rule, *e.g.*, a person who has descendants or ascendants cannot dispose of his property beyond a certain limit fixed by law.²

Certain persons cannot be benefited by any disposition of property made in their favour during illness of the donor, whether such dispositions are made by gift *inter vivos* or by will, *e.g.*, doctors of medicine, surgeons, barbers or chemists who have treated any one who is suffering from a disease of which he dies.³ In English law such a gift raises the presumption of undue influence owing to fiduciary relations between the doctor and patient, tutor and ward, and every case in which one person is in a position to dominate the other ; but this presumption can be rebutted. The French law declares such gifts void.

In French law delivery of the thing need not be made at the same time that the donee gets right to the thing. The donor becomes debtor to the donee from the time the gift is declared ; only the time of payment is

¹ French Civil Code, sec.
931.

² *Ibid.* sec. 913.

³ *Ibid.* sec. 909.

postponed. A donation *inter vivos* is an irrevocable act of transfer whereby the donor *ipso facto* divests himself in favour of the donee of the subject-matter of the gift.¹ In English law if there is no complete gift, it cannot be enforced at all. The Court will not assist a volunteer.

A donation accepted in proper form is complete by the *consent* of the parties alone. The property in the thing so given is transferred thereby without any formal handing over being necessary. In English law acceptance of a gift is presumed till the contrary is known.

There are peculiar rules as to revocation of gift in French law :

(a) Gift *inter vivos* will be revoked :

- (1) if the donee is ungrateful ;
- (2) if the donee has made an attempt against the life of the donor ;
- (3) if he has been guilty of treating the donor with cruelty or committing a serious criminal offence against him or of seriously insulting him ;
- (4) if he has refused him the necessaries of life.

This revocation does not take place *ipso facto* but the Court must declare it within a year². Revocation does not affect any alienations made by the donee nor does it affect either a mortgage of the subject-matter of the gift (sec. 58). Gifts made in consideration of marriage are not revocable for ingratitude. The rule is confined to gifts made by third parties and not to those made by the parties to the marriage to one another³.

(b) All donations *inter vivos* by a donor who had no children or living descendants at the time of making the gift will be revoked if a legitimate child is born to the donor or if an illegitimate child born after the date of gift is legitimised by marriage.

¹ French Civil Code, sec 894.

² *Ibid.*, sec. 959.

³ *Ibid.* Arts. 955-957.

As between assignor and assignee, the property in choses in action, rights or rights of action against a third party is transferred by handing over the document of title relating thereto ¹.

The *choses of action* are not the subject of sale and the assignee is required to get authority to sue. The assignee is not the owner in law of the chose in action as against a third person until he has given notice of assignment to the debtor. If the debtor recognises the assignment in a document drawn up by a notary, assignee gets a good title ².

In this respect English law is similar as to giving notice to the debtor to complete the title.

The Judicature Act (1873, sec. 25) enacted that debts and other legal choses in action are assignable at law without a valuable consideration.

Sale is a contract by which the one binds himself to deliver a thing, and the other to pay for it. It may be made by an authentic act or under private signature. It is perfected between the parties and ownership is acquired of right to the buyer in respect to the vendor so soon as they have agreed for the thing and for the price, although the thing may not have been delivered nor the price paid.³ The consent of the parties is all that is necessary to make the obligation of delivering the thing complete. Such consent makes the person to whom delivery has to be made the owner and the thing is at his risk from the moment it ought to have been delivered, although delivery is not actually made, unless the person bound to deliver is in default in delivery of the same, in which case the thing is at his risk⁴.

French law adopts the Roman law of sale; consent and fixity of the price complete the sale. Moyle and Pothier deal with the subject.

¹ *French Civil Code*, sec. 1689.

² *Ibid.*, sec. 1670.

³ *Ibid.* Arts. 1582-1583.

⁴ *Ibid.* Art. 1188.

Earnest money in French law does not prevent either party from rescinding the contract of sale ; the person who gave the earnest money forfeits it and the person who received it has to give double the amount. ¹ In English law it is taken as part performance ; it has no effect on the making of the contract itself.²

The rule of English law is that no property can be acquired through theft except money ; there is exception in the case of goods sold in market overt in English law and the buyer can get property in stolen goods. By the Larceny Act 1861,³ on the conviction of the thief the property reverts to the original owner by force of statute.⁴ In French law stolen goods may be recovered by the true owner at any time within three years ; if the actual possessor obtained them at a public auction or by sale in the ordinary way of business, the original owner can only get them back on paying the possessor the sum he gave for them.⁵

Thus there is a difference between English and French law in some points though the same principle is recognised.

(a) All shops in the city of London are market overt for the purposes of their own trade ; in France there is no such restriction, *e.g.*, sale at auction, or in ordinary place of business.

(b) In French law the time within which lost or stolen goods can be recovered is three years ; in English law there is no such time fixed, and they can be recovered any time.

(c) In English law the rule is confined to stolen goods ; in French law it applies to stolen or lost goods.

¹*French Civil Code*, 1590.

⁴Criminal Appeal Act, 1907,

²Sale of Goods Act, 1833, sec. 6.

³24 and 25 Vict. c. 96, sec. 17.

⁵*French Civil Code*, 2279-

sec. 100.

2280.

Belgium—In the law of Belgium gift is regarded as a Belgium. contract and must be executed by means of a registered document. Every act among persons *in esse*, whether by gift or for value, which is translatiue or declarative of rights in real property other than privileged debts and incumbrances, must be transcribed in the register. There are restrictions on the power of disposing of property, *e.g.*, a person having ascendants or descendants cannot dispose of property beyond a fixed amount.

Certain persons cannot benefit by a disposition owing to their being in fiduciary relationship to the donor. Delivery must be made to the donee who must accept it. Sale is completed by consent of the parties on fixing the price.

Italy—In Italian law gift is an act of spontaneous Italy. liberality by which the donor divests himself actually and irrevocably of the thing given in favour of the donee who accepts it. A gift is an act of liberality done out of gratitude or in consideration of the merits of the donee or as remuneration as well as that which imposes some charge on the donee¹.

Gift must be by a public act, otherwise it is null and void².

The gift must be accepted by the donee and it takes effect from the time acceptance is made known to the donor³.

Gift can be made of present goods of the donor; if it comprises future goods, it is null and void as regards the latter.⁴

A gift can be revoked on the ground of: (1) ingratitude; (2) birth of children to the donor after the gift is made⁵. Revocation on the ground of ingratitude is allowed⁶. The right to revoke cannot be renounced. The right to revoke will be barred after five years.⁷

¹ Secs. 1050-1051.

² Sec. 1056.

³ Sec. 1057.

⁴ Sec. 1064.

⁵ Secs. 1078—1080.

⁶ Sec. 1082.

⁷ Sec. 1090.

Gifts of whatever nature, made for whatever consideration, and in favour of any person, are subject to reduction if at the time of the decease of the donor they are known to exceed the portion of goods which the said donor can dispose of.¹

Sale is a contract completed by consent and fixing the price.

Portugal.

Portugal—In Portuguese law gift is a contract by which one party transfers gratuitously to the other all or part of his present goods². It must be accepted by the donee³. Gift is pure and simple, when it is purely an act of generosity and when it is not subject to any condition⁴. The donor can revoke gift if : (a) there is an unexpected birth of a legitimate child ; (b) if the donee is ungrateful; (c) or if there be the lawful heirs, legitimate portion is reduced⁵.

Spain.

Spain—In Spanish law every gift which is to take effect *inter vivos* is governed by the rules affecting contracts and obligations, that is by offer and acceptance. Gift may consist of all or part of the property of the donor ; property to be acquired in the future, cannot be made subject of gift. There is a limit to the amount which can be disposed of by gift. The gift must be executed before a notary. All acts which have for their object the creation, alteration or extinction of rights over immoveable property require a notarial instrument.

Sale is a contract completed by consent and fixing the price.

Argentine.

Argentine—In the Argentine Republic gift is a contract depending for its validity upon offer and acceptance. Contract of gift must be executed before a notary.

If the value exceeds 200 peses, oral evidence will not be allowed and the transaction must be proved by written evidence.

¹Sec. 1091.

²*Ibid* sec. 1465.

³Portuguese Civil Code, sec.

⁴Sec 1454.

1452.

⁵*Ibid.* secs. 1482—1490.

Other States—In the law of Colombia, Uruguay, Other Costa Rica and Chili a gift is regarded as a contract States. requiring offer and acceptance. It requires to be executed before a notary. The donor can set aside this gift on the ground of : (1) ingratitude ; (2) a legitimate child being born to the donor after the gift ; (3) the donor being incompetent to maintain himself according to his station in life.

In English law a gift is presumed to be accepted till the contrary is known.

There is no idea of trust in the legal system of any of the above countries. The idea of trust is peculiar to English law. If the gift is incomplete, it cannot be treated as a trust. Sale is completed by consent and fixing the price. This is the rule of Roman law.

The gift can be revoked in these countries : (1) for ingratitude of the donee ; (2) or a child being born to the donor after gift is made ; (3) or the heirs can impugn the gift, if their legitimate portion is diminished.

In English law these rules do not exist.

RULE II.—Contract or conveyance can be set aside at the instance of other persons for want of proper cause. Creditors can impeach an alienation.

France—Domat¹ says whatever debtors do, to France. defraud their creditors, is revoked.

If debtors alienate or dispose of their property in order to defeat their creditors, the creditors have a right to revoke such transactions.

(a) All dispositions which debtors make on the score of liberality to the prejudice of their creditors may be revoked, whether he who receives the liberality knew of the prejudice done thereby to the creditors or was ignorant of it ; for his honesty and integrity cannot hinder the thing from being unjust that he should profit by their loss. A dowry given by the father of a woman

¹ *Civil Law*, Vol. 1, p. 323.

or by other persons on marriage is not to be *set aside* when the husband is not aware of the fraud, even though the party giving it may have fraudulent intent.

(b) Alienations to fair purchasers. Alienations of moveables and immoveables which debtors make for reasons other than that of liberality to persons who purchase with an honest intention and for a valuable Consideration knowing nothing of the prejudice done thereby to the creditors, cannot be revoked whatever intention of defrauding the debtor may have had. For the debtor's knavish intention ought not to cause a loss to those who deal with him in lawful commerce and who have no share in his fraud. This rule will not apply where the creditors have a privilege or mortgage upon the thing alienated.

(c) If the purchaser is a partaker in the fraud, that he may profit by paying a low price, the alienation will be revoked without restitution of the price to the purchaser.

(d) Intention to defraud must result in actual loss, otherwise alienation will remain good.

Creditors can sue in their own name to have annulled any acts done by the debtor in defraud of their rights. *Prima facie* an act cannot be in defraud of creditors, if the debtor is solvent after doing it; but if he becomes insolvent in consequence, the Court will declare that the act was done fraudulently. Creditors cannot revoke gifts on account of ingratitude of donee because that right is personal to the donor¹.

Certain transactions are void and inoperative as regards the general body of creditors when carried out by the debtor after the time fixed by the Court to pay the creditors, *e.g.*: If the debtor ceases to make payment from that time fixed by Court or within ten days which preceded that date, all documents transferring moveable or immoveable property, without consideration and all payments in cash, can be set aside.

¹French Civil Code, Art. 1167.

Any fraud on creditors is prejudicial to trade, and law must protect the credit on which commerce is based.

In French law bankruptcy is culpable or fraudulent. It is culpable bankruptcy if it is the result of : (a) personal expenses or expenses of the household being excessive ; (b) if a large sum is spent in speculation ; (c) if with a view to postponing bankruptcy he has made purchases in order to resell below current price ; (d) if after cessation of payment the debtor prefers one class of creditors to the general body of creditors.

In English law fraudulent acts are thus defined in the Act of Bankruptcy : any alienation of property made with intent to delay, defraud or hinder creditors, is voidable.

In French law creditors can dispute any settlement made in consequence of a decree for judicial separation or divorce between husband and wife, one of whom is a trader, if it does not comply with formalities of the Code of Civil Procedure ; in English law it is not allowed.

If a ship at sea is sold by private agreement it will not prejudice the creditors of the vendor. The value received remains as a pledge to the said creditors who may impeach the sale on the ground of fraud.

In French Law a pledge confers on a creditor a right to obtain payment out of the thing which forms the subject-matter thereof, by priority and in preference to other creditors¹.

There must be a notarial document, or a document in the form of a private agreement duly registered, setting out the sum due as well as species and nature of the things pledged, or an appended list of their quality, weight, measure. The drawing up of the written document and registration are required in matters exceeding 150 francs in value².

¹ *Civil Code*, Art. 2073.

² *Ibid*, Art. 2074 and *Com-*

mercial Code, Art. 91, amended by law of 23rd May, 1863.

There is a Bill of Sale Act in English Law which resembles the French Law on the subject. The English Act requires re-registration every five years : not so in French Law.

The right of lien mentioned cannot be given over incorporeal moveables, *e.g.*, securities for debt, except by means of registered document drawn up by a notary, or else signed by the parties, and notice thereof must be given to the person liable on the security so given in pledge¹. Every pledge of a business must be inscribed in the public business of the registry of the Commercial Court of the place where the business is carried out, otherwise it is void as against third parties. The right of lien only exists over the pledge when the pledge has been placed and has remained in possession of a creditor or of a third person agreed upon by the parties². The above rule of pledge does not apply to trade transactions, nor to authorised pawnbroking businesses which have special laws to regulate them³. It was decided that a banker had no lien on goods transferred to his name at the custom house because pledging did not fall within the Code de Commerce, Sec. 93, and the formalities required by Art. 2074 of the Civil Code had not been complied with.

Belgium.

Belgium—In the law of Belgium conveyance can be set aside at the instance of creditors if it is done with intent to defraud them. If alienation is made to *bona fide* purchaser for value, it cannot be set aside if he was no party to the fraud. Creditors can sue in their own name to set aside an alienation made with fraudulent intent. These matters are regulated by the Commercial Code of Belgium. Bankruptcy law is divided into :—(1) bankruptcy ; (2) insolvency ; (3) composition. Suspension of payment applies to traders only. Arts. 437—439 deal generally with bankruptcy. Every trader who stops payment and whose credit has become destroyed

¹*Civil Code*, sec. 2075 :
Law 1st March, 1898.

²*Ibid.* sec. 2076; Domat,
Civil Law, Vol. I. Bk. III,

Tit. 1, sec. 1.

³*Commercial Code*, sec. 93;
Cass. 17th May, 1847.

is insolvent. All payments made, contracts entered into, and deeds and agreements signed by the insolvent person, and all payments made to him are void as from the date of the order. The following are void :

- (a) All deeds of transfer of real or personal estate without consideration, such as charges of contracts subject to onerous conditions, if the value given by the insolvent person exceeds to an appreciable extent the value of that which he has received in exchange. The rights of the wife in case of husband's insolvency is dealt with in Arts. 553—560 ; while secs. 577—578 deal with fraudulent bankruptcy. The *result of insolvency* is to render acts and deeds void and without effect so far as regards the debtor's estate when they have been done or executed by the debtor after a period fixed by the Court, as that when stoppage of payment takes place or within 10 days preceding such period.
- (b) All deeds transferring real or personal property without valuable Consideration, as well as deeds, transactions or contracts of exchange or onerous contracts, if the value of that which has been given by the insolvent person is appreciably above that which he has received in return are void.
- (c) All payments made whether in kind, by transfer, sale, composition or otherwise, for debts not due and for debts due ; all payments made otherwise than in money or in commercial securities ¹.
- (d) All deeds executed and payments made in defraud of creditors are void whatever their date ².
- (e) Composition to avoid bankruptcy is governed by the Law of 29th June, 1887.

¹ Arts. 444, 445, 446,

² Arts. 447, 448,

When money is advanced on the security of goods without delivery of possession to the pledgee, a notarial document must be required and registered.

Italy.

Italy.—In Italian law creditors have a right to set aside alienations made with intent to defraud them. Gifts made in consideration of future marriage whether by the future husband and wife between themselves or by others in favour of the future husband and wife, or of children to be born of them cannot be attacked ¹.

There is no cession of goods or abandonment by the debtor to his creditors of his whole property when he is unable to pay his debts. This is not necessary because the creditors have a right to take the goods.

If the stock-in-trade is pledged, the assignment must be made in the presence of an officer of the court and registered. This is regulated by the Commercial Code of Italy. This provision resembles the English Bills of Sale Act, 1882, but it does not enforce renewed registration every five years or limit the bill to an amount exceeding £30.

Portugal.

Portugal.—In Portuguese Law creditors can set aside alienations made in defraud of their rights. The Bankruptcy Act enacts that every gratuitous alienation which the debtor makes before adjudication, but after suspension of payment or within thirty days so as to prejudice the creditors, is void.

Spain.

Spain.—In Spanish Law creditors have a right to set aside alienations of property made with intent to defraud them if they can prove: (a) alienation of real property made for value within a month previous to declaration of bankruptcy; (b) grant of dowry within one month or other alienation of the property without receiving value; (c) settlement on marriage or acknowledgment of capital made by a trader in favour of his wife within six months preceding bankruptcy; this rule will not apply to the inherited property or property acquired beforehand by the spouse in whose

¹Italian Code, sec. 1062.

favour the husband makes acknowledgment of dowry or capital ; (d) admission of receipt of money or effects of a loan made six months previous to the bankruptcy ; this must be verified by notarial instrument, or if made by a notarial instrument by books of contractors ; (e) mercantile contracts, obligations of the bankrupt which are made within last ten days before bankruptcy.

Every gift or contract made within two years preceding bankruptcy can be set aside by the creditors if they can show any pretence or suggestion of fraud.

The following transactions are declared fraudulent if they were made within one month preceding bankruptcy :

(a) Transfer of immoveable property made without value.

(b) Dowries given to daughters out of private property.

(c) Grants and transfers of immoveable property in payment of debts not due at the date of declaration of bankruptcy.

(d) Gifts made after the liabilities are in excess of assets as indicated by balance sheet.

In Spanish Law bankruptcy is of three kinds : (a) fortuitous, (2) culpable, (3) fraudulent.

All acts by virtue of which a debtor alienates property gratuitously is presumed to be made in defraud of creditors. Alienations for value are presumed to be fraudulent when they are made by persons against whom a judgment debt is due. If the alienee for value was privy to the fraud, the transaction can be set aside by the creditors within four years.

Pledges of goods without delivery of possession are required to be effected by notarial instrument. This provision resembles the Bills of Sale Act, 1882.

Other States.—In the Argentine Republic alienations of moveable or immoveable assets, rights, rights of States.

action granted gratuitously are void if the interests of creditors are affected, even though there is no fraud. Alienation made by the insolvent person after petition to the Court and from the date on which the tribunal fixes as the date of suspension of payment are absolute or relative as regards the estate.

In Colombia, Uruguay, Costa Rica and Chili creditors have a right to impeach alienation made gratuitously if their rights are defeated.

In English law creditors can impeach an alienation made with intent to defraud, delay or hinder the creditors¹. There is similar provision made in the laws of the States given above. There is an instrument resembling Bill of Sale in some of the countries.

C.—DUTY TO DISCLOSE THE NATURE OF CAUSE.

France.

I. *France*.—In French Law instruments are required to be in writing when the subject-matter of contract exceeds the sum or value of 150 francs².

Belgium.

Belgium.—In the Law of Belgium certain contracts must be reduced to writing when the subject-matter exceeds the sum of a fixed amount.

Italy.

Italy.—In Italian law some contracts must be in writing. Italian Law adds to and modifies the rule of French law. The general limit which is required is 500 liras instead of 150³. Contract of Sale of immoveable property, leases for seven years, must be in writing and signed by the parties. This rule does not apply to commercial contracts.

Portugal.

Portugal.—In Portuguese Law disposition of immoveables the value of which does not exceed 50,000 *reis* (280 francs or about £11) can be made by act under the seal signed by the donor or another person for him if

¹ 13 Eliz. c. 4 5, 27 Eliz. c. 4.

² *French Civil Code*, Arts 1341-48; Sirey and Gilbert's *Commentary on French Civil*

Code, p. 115; Wright's *Annotated Civil Code*, p. 212.

³ *Italian Civil Code*, sec. 1341.

he cannot write and further by two witnesses who must write their names in full. Gifts of higher value can be made by public act¹.

Spain.—In Spanish law :—(1) contracts which create, Spain. alter or extinguish rights to immoveable property; and (2) leases of immoveable property extending over six or more years when it is to prejudice the right to a third person; and (3) marriage settlements must be reduced to writing setting forth the nature of the cause.

Other States.—In the Argentine Republic there is no Other rule or statute corresponding to the Statute of Frauds; States. but certain transactions are required to be in writing and if writing is not used, they cannot be proved by parole evidence. Merchants are required to make entry of every mercantile transaction.

II. In French Law the pledge of property over 150 francs in value must be in writing and registered

In the Law of Belgium every instrument prepared by a notary must be copied in a register. Pledge of property must be made in writing and registered². Notarial deed of charges on property must contain full particulars of the transaction, including the value for that security.

In Italian Law if Stock-in-trade be secured for loan of money the assignment must be made before an officer of the Court and registered, setting out the statement of value given.

In Portuguese Law there is an instrument corresponding to a Bill of Sale. It must be executed before a notary³. Mortgage of ships must be registered.

In Spanish Law pledges of moveables must be effected by a notarial instrument.

¹*Civil Code of Portugal*, Art. 1.
sec. 1459.

³*Commercial Code of*

²*Belgium Commercial Code*, Portugal.

In the Argentine Republic there is an instrument resembling a Bill of Sale when any charge is created on goods or chattels.

In Colombia, Uruguay, Costa Rica and Chili, there is an instrument resembling Bill of Sale.

These countries have provision made for pledges of moveables without giving delivery of possession. There is a great resemblance between English Bills of Sale and instruments recognised in these Codes.

III. In French Law compromise is required to be made in writing setting out the nature of the cause ¹.

In the Law of Belgium, Italy, Portugal, Spain, the Argentine Republic, Colombia, Uruguay, Costa Rica, and Chili no writing is required for a compromise. English law does not require a writing. It is a valid cause in all countries.

IV. In the law of France Bills of Exchange and promissory notes must be in writing setting forth the value on the face of the instrument.

In the law of Belgium, Portugal and Spain the instrument must contain the statement of value on the face of it.

In the law of the Argentine Republic, Colombia, Uruguay, Costa Rica and Chili the absence of the statement of cause in negotiable instrument is not any defence against a third person who becomes a holder of it in due course.

V. In the law of France a mercantile guarantee must appear in writing ; otherwise it will be invalid.

In the law of Belgium, Italy, Portugal and Spain the mercantile guarantee must appear in writing.

In the law of the Argentine Republic, Colombia, Uruguay, Costa Rica and Chili all mercantile transactions, including mercantile guarantees, must be reduced to writing setting forth the nature of cause in the instrument.

¹*French Civil Code*, sec. 2044.

In English law the Mercantile Amendment Act makes exception in cases of commercial contracts.

VI. In the law of Portugal, the Argentine Republic, Colombia, Uruguay, Costa Rica and Chili, the mortgage of ships must be registered, setting out the cause in the instrument.

In English law there is a Merchant Shipping Act, 1894, which enacts special provisions for transactions relating to the transfer of ships requiring registration and valuable Consideration to be fully made in the instrument itself.

**THE ENGLISH DOCTRINE OF CONSIDERATION
COMPARED WITH THE DOCTRINE IN THE
LAW OF CANADA (DOMINION LEGISLATION)
LOWER CANADA, MALTA AND ST. LUCIA.**

The Common Law of the Province of Quebec, except in commercial matters, is the *coutume de Paris*, the Common Law of the other provinces, as well as of Quebec in commercial matters, is the Common Law of England. The Common Law of England was introduced into several provinces as follows :—

(1) Quebec on the first settlement of the country by the French in 1608.

(2) Ontario by the first act of the Legislature of Upper Canada (now Ontario) in 1792.

(3) Nova Scotia was ceded by France in 1713; it was regarded as a colony by settlement. The law of England was first extended as part of the personal law of the first English settlers.

(4) New Brunswick was separated from Nova Scotia in 1784.

(5) Prince Edward Island was separated from Nova Scotia in 1770.

(6) North-West Territories received Charter of Hudson's Bay Company in 1670.

(7) Manitoba.

(8) West Colombia received the Common Law of England on the first settlement by the English.

The Statutory law of Canada consists of imperial statutes extending to Canada. French Civil Law prevails in Québec. There is a Civil Code for Quebec. The law of Lower Canada (Quebec) in civil matters has modified the *coutume de Paris* by means of provincial statutes or by introducing a part of the law of

England. There is a Civil Code which came into force from 1st August, 1866; the Code of Civil Procedure was introduced in 1867; a revised Code of Civil Procedure was passed in 1897¹.

By the Quebec Act of 1774 it is provided that in civil matters the old law shall still apply. Hence the French Doctrine of Cause is retained.

The rules of the Common Law of England, including the Law of Merchant, save in so far as they are inconsistent with the express provisions of this Act apply to Bills of Exchange, promissory notes and cheques².

In 1785 it was enacted by statute that in commercial matters the English rules of evidence should be allowed.

CONSOLIDATED STATUTES FOR LOWER CANADA.

Lower Canada.—The Civil Code came into force in 1866 and is based on French Law. Lower
Canada.

Whereas the laws of Lower Canada in civil matters are mainly those which at the time of the cession of the country to the British Crown were in force in that part of France then governed by the custom of Paris modified by provincial statutes or by the introduction of portions of the law of England in peculiar cases³.

The requisites of a validity contract are :—(1) that the parties are legally capable of contracting; (2) their consent must be legally given; (3) something must form the object of the contract; and (4) there must be a lawful cause or consideration⁴. This is taken from the French Civil Code.

Malta.—The Common Law of Malta is still that which was in force when it became a British possession.

N.B.—In the Civil Code of Lower Canada the word cause or consideration is used.

¹*Journal of Comparative Legislation*, 1908, p. 325.

²Revised Statutes of Canada, 1906.

³The Civil Code of Lower Canada.

⁴Code Art, 984.

It is based on Roman Law, Common Law, Feudal Law and Custom. The Grand Masters of the Order of St. John of Jerusalem codified the law. Rohan is the most important Code (1784). *Gara v. Cianlar*, 1887, L.R. 12 A.C. 557; Ordinances No. 7 of 1868 and Ordinance No. 1 of 1873 are a reproduction with modifications of the Italian Civil Codes¹.

A consolidation, ordinance, No. VII of 1868, enacts that a contract is an agreement or an accord between two or more persons by which an obligation is constituted, regulated or dissolved².

The requisites of a contract are the capacity of the parties to contract; consent of the party who binds himself; a certain object which forms the matter of the contract; a lawful cause for obligation³. This section is taken verbatim from the French Civil Code.

St. Lucia.

St. Lucia.—English law prevails where the Codes are silent. The Statute law consists of Ordinances and a Civil Code. The statutes of the United Kingdom do not operate in the Colony. Some Orders in Council have been adopted by the legislature. The Doctrine of Cause applies. The Civil Code of St. Lucia was passed in 1879, and is based on the Civil Code of Quebec. The English language is used in the Courts since 1842.

A contract to be valid must have a subject and a lawful cause or consideration. The parties to it must be legally capable and their consent legally given.

A.—RULES OF CAUSE IN THE LAW OF CONTRACT.

RULE I.—A Cause is required in order to make every contract binding between the parties to it.

It is essential to an obligation that it should have a 'Cause' from which it arises, the persons between whom it exists and an object⁴.

¹Burge, *Colonial Law*, Vol. I, p. 327.

²Sec. 663.

³Sec. 669.

⁴Civil Code of Lower Canada, Art 982.

A contract without a consideration is of no effect ; it does not matter if it is not expressed or incorrectly expressed in the writing which is evidence of the contract¹.

In *Malta* an obligation without a cause can have no effect².

In *St. Lucia* a contract without a cause or consideration is void.

The French law is reproduced in these British Colonies. The English Doctrine of Consideration is not accepted³.

In Lower Canada a Bill of Exchange is defined as a written order by one person to another for the payment of money absolutely and at all events⁴. It is essential that a Bill of Exchange should be in writing and contain the signature or name of the drawer ; that it be for the payment of a specific sum of money only ; that it be payable at all events without any condition. Bills and Notes.

The Consolidated Statutes of Canada, 1906⁵, deal with consideration in bills and notes. Art. 2285 enacts that when a bill contains the words 'value received,' value for the amount of it is presumed to have been received on the bill and upon the indorsements thereon. The omission of these words does not render the bill invalid.

In Malta, Ordinance No. 13 of 1857, Tit. VIII, deals with negotiable instruments.

In St. Lucia, Ordinance No. II of 1893, and No. 8 of 1907, deal with negotiable instruments. When a bill contains the words 'value received,' value for the amount, it is presumed to have been received on the bill and endorsement thereon ; omission of these words does not render the bill invalid⁶.

In these colonies the statutes are based on the English Bills of Exchange Act. The defence of want of consi-

¹ Art 989.

² Sec. 693

³ Sec. 923.

⁴ Sec. 2280.

⁵ Ch. 119, secs. 10, 19.

⁶ Sec. 2150.

deration is not valid. The bill must be in writing and contain signatures.

RULE II.—Cause is not restricted to any benefit which the promisor should derive, or loss or detriment which the promisee should incur by relying on the promise.

In Lower Canada, Malta and St. Lucia, cause is interpreted in the light of French decisions and is quite distinct from consideration in English Law. As a general rule none but the parties to the contract can enforce it.

RULE III.—In Lower Canada contracts have effects only between the contracting parties ; they cannot affect third persons¹.

EXCEPTIONS :

(1) A person cannot by a contract in his own name bind anyone but himself and his heirs and legal representatives ; but he may contract in his own name that another shall perform an obligation and in this case he is liable in damages if such obligation be not performed by the person indicated².

(2) A party in like manner may stipulate for the benefit of a third person when such is the condition of a contract which he makes for himself or of a gift which he makes to another ; and he who makes the stipulation cannot revoke it, if the third person has signified his assent to it³.

A person is deemed to have stipulated for himself, his heirs and legal representatives, unless the contrary is expressed or results from the nature of the contract⁴.

(3) Creditors may exercise the rights and actions of their debtor when to their prejudice he refuses or neglects to do so ; with the exception of those rights which are exclusively attached to the person⁵.

¹Sec 1023.

²Sec. 1028.

³Sec. 1029.

⁴Séc.1030.

⁵Sec. 1031.

Malta.—In the law of Malta no one can bind himself Malta or stipulate in his own name except by himself. The exceptions are :—

(1) A person can bind himself in favour of another by providing that something should be done by a third person. Such promise gives only a right to indemnity against the party who has bound himself or who has promised ratification if the third party refuses to perform the obligation.

(2) Any person may stipulate for the advantage of a third person when he constitutes the mode or condition of a stipulation made in his own favour or of a donation or grant made to others. The party who has made such a stipulation cannot revoke it if the third party has declared that he is willing to avail himself of it¹.

St. Lucia.—In the law of St. Lucia contracts have St. Lucia. effect only between the contracting parties. They cannot affect third parties except in the following cases :—

(1) A person contracts in his own name that another shall perform an obligation and in this case he is liable in damages if such obligation be not performed by that person². A person is deemed to have contracted for himself, his heirs and legal representatives unless the contrary is expressed or results from the nature of the contract³.

(2) A party in like manner may stipulate for the benefit of a third person when such benefit is the condition of a contract which he makes for himself or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person has signified assent⁴.

(3) Creditors may exercise any rights which are not exclusively attached to the person of the debtor

¹Malta, Sec. 705, 706.

³Sec. 963.

²St. Lucia, Sec. 961.

⁴Sec. 962.

when they are prejudiced by his neglect or he has refused to exercise them¹.

In English law the rule is that no stranger to the contract can enforce it. In order that a third person may enforce it directly against the other there must be trust or agency. In these colonies the cases in which a third person not a party to the contract can enforce it are specially provided. This rule is taken from the French Civil Code.

RULE IV.—An act or forbearance constituting a cause must be of some value. A contract can be set aside on the ground of inadequacy of cause or consideration.

Lower
Canada.

Lower Canada.—In Lower Canada persons of full age are not entitled to relief from their contracts for cause of lesion only².

St. Lucia.

St. Lucia.—In St. Lucia inadequacy *per se* is no ground to set aside a contract.

Malta.

Malta.—In Malta the rule of lesion applies to contracts and the inadequacy of value is a ground to set it aside³.

A contract of sale may be in whole or in part dissolved by the exercise of the right of *retractio* and may be rescinded by reason of lesion. The sale of moveable property can be rescinded on account of lesion at the instance of the party suffering⁴.

The seller can set it aside if the agreed price be less than half of the just value which the immovable sold had at the time when the contract was made. There is lesion for the purchaser if the just value of immovable purchased at the time of purchase was less than a moiety of the price agreed. The seller has the choice of taking back the thing and restoring the price or of keeping the price and restoring the excess to the purchaser⁵.

¹Sec. 964.

²*Lower Canada Civil Code*,
sec 1012.

³Sec. 920.

⁴Sec. 1205.

⁵Malta, secs. 1206, 1209.

Lower Canada and St. Lucia have departed from the rule of Roman law about *laesio enormis*; inadequacy of value *per se* is not a valid ground to set aside the contract of sale. Malta still has that rule derived from Roman law and taken from the French Civil Code.

In English law inadequacy of value is not a valid ground to set aside a contract. But if there is fraud or underhand dealing along with the low price the contract will be set aside.

RULE V.—The cause of obligation must be lawful and not opposed to public policy.

In Lower Canada a contract with an unlawful Cause or Consideration has no effect¹. Lower
Canada.

A Cause is lawful when it is prohibited by law or is contrary to good morals or public order².

There is no right of action for the recovery of money or any other thing claimed under a gaming contract or bet. But if the thing or money has been paid by the losing party, he cannot recover it, unless fraud be proved. The above rule does not apply to exercises for promoting skill in the use of arms, horses, foot races and other games which require bodily activity³.

The law will not enforce contracts based on immoral consideration. In *Bruneau v. Labiberto*⁴, the point was discussed whether a contract of insurance upon the furniture of a house of ill fame is one which the Court will enforce or not. Andrew J. held: "We have a decision of our Courts reported in 25 *Lower Canada Journal*, 127, in *Garish v. Duval*, decided by Bruneau J., that a lease of such promises is void and will not be enforced by the Court. And this is in conformity with the law and jurisprudence of England and France and of the United States."

Taint of
immoral
considera-
tion.

¹ *Lower Canada Civil Code*,
sec. 989.

Tit. 1, sec. 5 n13; Liv. 1,
Tit. 1 sec. 1 n5.

² Sec. 910 see Pothier,
Obligations, secs. 42, 43;
Domat's *Civil Law*, Liv. I,

³ Sec. 1927.

⁴ 19 *Rapp. Jud de Quebec*,
425.

Malta.

Malta.—In Malta an obligation with an unlawful cause can have no effect. The cause is unlawful when it is forbidden by law and when it is contrary to morals or to public order¹.

If the thing for which something has been promised is unlawful on the part of the person stipulating, what has been given for the performance of the contract may be recovered². The law does not grant any action for a debt at play or for the payment of a wager. Action is not allowed: (1) for the recovery of sums of money lent by any person who knew that it was to be employed in any game³; (2) for the recovery of sums lent by a person interested in the game for the payment of a debt at such game. Exception is made in favour of games tending to promote skill in the use of arms and races intended to increase dexterity and agility of body. The Court may reduce the amount when the sum appears to be excessive⁴. Any payment for a lottery made within the island of Malta or elsewhere may be recovered from the person into whose hands the payment was made.

St. Lucia.

St. Lucia.—In St. Lucia contract with an unlawful cause is void⁵. The cause is unlawful when it is prohibited by law or is contrary to good morals or public order⁶.

There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet. But if money or anything has been paid by the losing party, he cannot recover it, unless fraud be proved. Exception is made in favour of a contribution towards any prize or sum of money to be awarded to the winner of any exercise promoting skill in the use of arms or of any horse or foot race, and any other lawful game which requires bodily activity or address. A note or bill of exchange which is illegal as a gaming contract or bet is void as between the original parties

¹Sec. 696.

²Sec. 697.

³Sec. 1473.

⁴Sec. 1474.

⁵Civil Code of St. Lucia,
sec. 923.

⁶Sec. 924.

but is valid in the hands of any person to whom it has been transferred for value without notice of illegal consideration. (Secs. 1822—1824 are taken verbatim from the French Civil Code and the Civil Code of Lower Canada.)

RULE VI.—The word cause includes a motive and a desire to return a benefit already rendered. A promise is a valid cause.

In Lower Canada, Malta and St. Lucia cause includes motive.

In English law motive is not the same thing as consideration. The rule is based on French, not on English law.

RULE VII.—An obligation can be extinguished by means of payment or release of right.

Malta.—In Malta if the law-suit to which the parties wish to put an end has for its object immoveable property, the transaction is null if it be not made by a public act. Abandonment of a right or claim, if *bona fide*, constitutes a valid cause¹.

The peculiar rule of English law that a smaller sum cannot be a satisfaction for a larger amount does not obtain in the law of Canada, Malta and St. Lucia: if the payment is accepted in lieu of obligation, the cause is extinguished; and the consent of the creditor is quite enough to satisfy the requirements of law.

RULE VIII.—Parties can put an end to a dispute by means of a compromise.

St. Lucia.—In St. Lucia the abandonment of a right or forbearance of exercise of right is a good cause.

In Lower Canada and St. Lucia such a contract of compromise is required to be in writing. (In this respect French law is reproduced in Canada.) In the law of Malta compromise is a contract by which the parties put an end to a law suit commenced or about to commence².

¹Sec. 1479

²Sec. 1478.

RULE IX.—Moral Consideration is regarded as a valid Cause.

It does not matter if it is past.

In the law of Lower Canada, Malta and St. Lucia, the word cause includes any moral ground for the promise of the parties.

RULE X.—Community of goods prevails among the spouses in the absence of the ante-nuptial contract to the contrary; a promise made to give something in pursuance of a contemplated marriage is binding.

This rule is based on French law. In the law of Malta there is no community of property between husband and wife. This rule is expressly abrogated by No. IV of 1867. In St. Lucia, there is community of goods between spouses in certain kinds of property unless there is an express stipulation to the contrary. (Sec. 1190).

RULE XI.—There is no instrument in the nature of a deed in the law of Lower Canada, Malta and St. Lucia.

Contracts are divided into verbal and written. There prevails the peculiar system of notaries; the English system of registration is introduced by legislation.

Mr. W. F. Craies¹ says that "In pursuance of the policy of England the law of Old France was allowed to prevail in Lower Canada. But soon after the conquest of Canada, the Common Law of England was substituted for that of France². The old French law already abolished in France was found unsuited in form and substance to the needs of the province and feudal land tenures imported from France were abolished by the Canadian legislature. The Civil law, till then resting on the *Coutume de Paris*, was codified

¹*Journal of the Society of Comparative Legislation*, Vol. II, p. 233, No. 2 (1900).

²Quebec Act, 1893, c. 83, sec. 11.

partly on the model of the Code Napoleon, partly in conformity with English law; local government rests on colonial legislation and not on French law."

The Quebec Code of Civil Procedure, 1897, does not resemble the French Code of Civil Procedure. It is based on the Civil Procedure Code of Louisiana. The law of proof in civil matters is still French¹. "Our system, if system it may be called," write the Commissioners, "has been borrowed without much discrimination partly from France and partly from England; it has grown up by a sort of tacit usage and recognition without any orderly design or arrangement and has not yet received any well defined or symmetrical form from the decisions of our courts."

B.—THE DOCTRINE OF CAUSE AS IT AFFECTS THE LAW OF PROPERTY AND CONVEYANCING.

RULE I.—The presence or absence of a cause affects the legal nature of the transaction.

Lower Canada.—In Lower Canada gift *inter vivos* is Lower Canada.
an act by which the donor divests himself by gratuitous title of the ownership of a thing in favour of the donee whose acceptance is requisite and renders the contract perfect. Acceptance makes it irrevocable². It is essential to a gift that the donor should actually divest himself of his ownership in the thing given (sec. 777). Acceptance may be subsequent to the deed of gift, but it must be made during the life-time of the donor and while he is still capable of giving (sec. 791). A universal donee *inter vivos* of the present property is personally liable for all debts due by the donor at the time of the gift (sec. 797).

Gift *inter vivos* of any property must be registered in order to prevail against third parties (sec. 806). Gifts of moveables, whether universal or particular, are exempt from registration when delivery is made to the donee

¹Burge's *Colonial and Foreign Law*, Vol. I, p. 229.

²Civil Code of Lower Canada, sec. 755.

(sec. 808). A gift can be revoked on several grounds (secs. 811, 812). This rule is based on Roman law as accepted in the French Civil Code.

Sale is a contract by which one person gives a thing to another for a price of money which the latter obliges himself to pay for it. It is perfected by consent alone (sec. 1472). The law of sale is based on English law of the Sale of Goods Act, 1893.

There is no idea of trust in the English sense of the term and the distinction between legal and equitable estate is not to be found in Canadian law based on the French Civil Code, but is gradually introduced from English law.

Malta.

Malta.—In the law of Malta gift is a contract by which the donor irrevocably and gratuitously transfers a thing to the donee who accepts it. A gift in which the donor reserves to himself the power of revoking or altering the donation itself is null. There can be no *donation mortis causa* (sec. 1497). A gift is void unless it is made by a public act. A gift is not complete unless it is accepted by the donee himself (secs. 1512-1513). Mutual gifts of money or other moveable corporal things or titles payable to bearer when the sum is moderate, having regard to condition of persons and other circumstances, are excepted¹. Gifts can be set aside by the donor if the donee is guilty of gross ingratitude (sec. 1548). This right to revoke is personal to the donor against the donee himself and must be exercised within one year.

St. Lucia.

St. Lucia.—In the law of St. Lucia gift *inter vivos* is an act by which the donor divests himself by gratuitous title of the ownership of a thing in favour of the donee whose acceptance is requisite and renders the contract perfect. Acceptance makes it irrevocable, saving the cases provided by law or a valid resolute condition². Deeds containing

¹Consolidated Ordinances of Malta, sec. 1512.

²Civil Code of St. Lucia, sec. 696.

gifts *inter vivos* must be under pain of nullity executed in notarial form. Gifts of property accompanied by delivery may be made and accepted by private writings or verbal agreements (sec. 717). The donor must divest himself of the ownership of the thing given and the donee must accept the thing, except when the donee is an unborn child. To affect the rights of third parties in the case of moveables either delivery must be made or in the case of immoveables the deed of gift must be registered (sec. 736). A universal donee *inter vivos* of present property is liable for all debts due at the time of the gift (sec. 738).

In St. Lucia a gift *inter vivos* is void if it is made in contemplation of death when the donor was ill. There cannot be *donatio mortis causa* (sec. 703).

Gifts *inter vivos* are liable to be revoked : (1) on the ground of ingratitude on the part of the donee ; or (2) subsequent birth of a child to the donor unless there is a condition to the contrary ; (3) refusal to maintain the donor, having regard to the nature of the gift and the circumstances of the parties. Revocation must be made within a year from the time the offence is committed. This right to revoke is personal to the donor against the donee himself.

In English law a gift cannot be revoked on any of the grounds mentioned above ; the acceptance of the gift is presumed till the contrary is known.

There is no law of trust in Lower Canada, Malta or St. Lucia as it exists in English law ; if a gift is incomplete, it cannot be treated as a trust.

RULE II.—Conveyance though perfected can be set aside for want of cause.

Lower Canada.—In the law of Lower Canada creditors have a right to avoid contracts and payments made to defraud them. Lower
Canada.

Creditors may in their own name impeach the acts of their debtors in defraud of their rights if they show that alienation was made with intent to defraud them ; a

gratuitous contract is deemed to be made with intent to defraud if the debtor be insolvent at the time of making it; an onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud. (secs. 1032—1036).

Under the Insolvency Act, 1864, provision is made concerning presumption of fraud and nullity of acts done in contemplation of insolvency.

An onerous contract made with intent to defraud on the part of the debtor, but in good faith on the part of the person with whom he contracts, is not voidable; saving the special provisions applicable in cases of insolvency of traders (sec. 1038). No contract of payment can be avoided by reason of anything contained in this section at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining knowledge thereof (sec. 1040).

Malta.

Malta.—In the law of Malta creditors whose rights are affected can impeach alienations made with intent to defraud. If such acts are under an onerous title, the creditors must prove that there was fraud on the part of both contracting parties; if they are under gratuitous title it is sufficient to prove that there was fraud on the part of the debtor. This rule corresponds to the Statutes of Elizabeth.

Ordinance No. XIV, of 1897, deals with registration of certain privileges and hypothecations. This ordinance resembles the English Bills of Sale Act.

St. Lucia.

In the law of St. Lucia creditors can impeach the fraudulent act of debtors.

A contract cannot be avoided unless it is made by debtor with intent to defraud and will have the effect of injuring the creditor.

A gratuitous contract is deemed to be made with intent to defraud if the debtor be insolvent at the time of making it; an onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud (sec. 968).

An onerous contract made with intent to defraud on the part of the debtor, but in good faith on the part of the person with whom he contracts, is not voidable saving provisions applicable in cases of bankruptcy. The person who receives payment or property knowing the owner to be insolvent will be compelled to restore to the creditors what he has received. All contracts without consideration or with a merely nominal consideration, made by a trader, who afterwards becomes bankrupt, with any person within three months next preceding the assignment or petition for adjudication of bankruptcy, and all contracts by which creditors are injured or delayed made by a trader unable to meet his engagements and afterwards becoming a bankrupt, with a person knowing such inability or having probable cause for believing such inability to exist, or after such disability is public and notorious, are presumed to be made with intent to defraud creditors and may be avoided by the Court (sec. 471). A contract for consideration by which the creditors are injured or delayed, made by a trader unable to meet his engagements, with a person ignorant of such inability, may be set aside by the Court upon such terms as to protection from actual loss or liability by reason of such contract as the Court may order (sec. 2572).

In English law, 13 Eliz. c. 5 : 27 Eliz. c. 4 deal with the subject. The Bankruptcy Act (sec. 47) avoids acts done with intent to defraud, delay or hinder creditors.

There is no enactment similar to the English Bills of Sale Act. Gifts made by an insolvent person, within three months previous to assignment or petition for adjudication, may be set aside and the subject of the gift or its value recovered from the donee by order of the Court (sec. 2476).

In English law, 13 Eliz. c. 5 and 27 Eliz. c. 4 give creditors the right to impeach fraudulent conveyances if they are delayed, defrauded or hindered in the ex-

ercise of their rights by their debtors. Similar legislation has been introduced into Lower Canada, Malta and St. Lucia.

C.—OBLIGATION TO DISCLOSE NATURE OF CAUSE OR CONSIDERATION.

I. There are ordinances corresponding to the English Statute of Frauds which require certain documents to be reduced to writing in Lower Canada, Malta and St. Lucia.

II. The transfer of ships must be made according to the Merchant Shipping Act of Imperial Parliament, the Merchant Shipping Act 1854, and Amending Acts.

III. There are special acts relating to Pawnbrokers.¹ Also in St. Lucia such provision is made.

IV. In order to create a pledge of moveables possession must be delivered in Lower Canada; but in Malta there is an Ordinance No. XIV of 1897, by which pledges and hypothecations must be registered. In St. Lucia there is no provision made in this matter. The English Bills of Sale Act is adopted in Malta only.

V. Lord Tenterden's Act (sec. 17) which enacts that a mercantile guarantee need not be in writing, is adopted in the law of Lower Canada.

THE DOCTRINE OF CAUSE OBTAINS IN THE FOLLOWING BRITISH POSSESSIONS.

Channel Islands.—The Common Law of the Channel Islands is based on the customary law of Normandy as it existed in the time of King John. The French doctrine of cause prevails. The English law is gradually superseding French law.

*Guernsey.*²—The customs of Normandy are very strictly observed and procedure and practice are very crude. Property law is feudal. Aldersey and Sark are linked with Guernsey. Here the French law of cause prevails.

¹Consolidated Statutes of Canada, ch. 54.

²Berry, *History of Guernsey*:
Tupper, *History of Guernsey*.

Jersey.—The principal sources of law, writes Burge,² Jersey¹ are customary law charters, orders of the Sovereign in Council, ordinances of the local legislature, and some statutes of the realm. The customary law is often cited under the name *Roville*.

The passing of a contract in Jersey is tantamount to execution of a deed in England to transfer real property ; in others it is similar to executing a deed of mortgage ; a contract is the means of conveying the mortgage to a third person. Contracts are written on parchment by special officers, and instead of being signed, sealed and delivered by the parties thereto, the parties present themselves before the Court consisting of a bailiff and two jurats who administer to them an oath that they shall abide by the condition contained in the parchment. The bailiff and jurat sign the same as a record ; the signature of parties is not required as in England. The contract is an act of the Court testifying to the parties having given their free consent to the terms and conditions. After the bailiff and jurats have signed the parchment, it is copied in the Public Register.

When any immoveable property is to be transferred, the parties must go before a bailiff and two jurats. The creditors can oppose such an alienation if the property was secured to satisfy their debt. Moveable property may be conveyed or mortgaged by delivery or before a bailiff and two jurats. If moveable property is not conveyed, it will be deemed fraudulent against third parties.

In *La Cloche v. La Cloche*³ it was held that Terrien was the best evidence of the old customs of Normandy and the Channel Islands before the separation of Normandy from the English Crown.

¹*The Laws, Customs and Privileges of the Island of Jersey, by Abraham Jones, 1839 ; Jersey Recueil des*

Lecis, Tomes, I. III. IV, 1771—1899.

²*Colonial and Foreign Law. Vol. 1, p. 131,*

³ 1870 L. R. 3 p. C. 136.

In *Falli v. Godfrey*¹ it was held that the customs of Orleans and Paris are not in force in Jersey.

Mauritius²

The island of Mauritius was occupied by the Portuguese, the Dutch and the French. 'The Portuguese,' says Burge,³ 'have left no trace of their occupation on the laws of the island. It was ceded to England by Capitulation in 1810.' By this capitulation (Art. 8) it was expressly agreed to preserve⁴ to the inhabitants their laws, religion and customs. Among the laws so preserved were the French Civil Code, the Code of Civil Procedure and the Code of Commerce. English is the language of the Court since 1847.

There is no Common law, in the sense that there is no unwritten law in the Colony. By the Treaty of Paris, 1814, Mauritius and its dependencies were ceded to England by France. French law was preserved and gradually modified on certain points by subsequent legislation derived from French and English sources. The Common law of England has been applied in trial by jury and in matters of evidence in all points not provided by the local law.

The Supreme Court of Mauritius is a Court of equity and is invested with the powers, authorities and jurisdiction possessed and exercised by writ of Queen's Bench. The Common law of England is applied in many cases.

The Statutory Law of the colony consists of the French Civil Code, the French Code of Civil Procedure, and the French Code of Commerce as it stood in 1810; all these laws are modified⁴.

The Doctrine of Cause prevails in Mauritius and the rules are the same as in French law.

¹ 1888, 14 A. C., p. 76.

² *Commentary on French Civil Law*, by Wright, E. Blackwood, contains references to the Mauritius and Seychelles Ordinances.

³ *Colonial Law*, Vol. I,

199-207.

⁴ *Revised Laws of Mauritius*, by F. J. Piggot, 1905; *Journal of Comparative Legislation*, 1900, Vol. II, New Series, 506-513.

The Bankruptcy Ordinance, No. 23 of 1887, is based on the English law of Bankruptcy *cessio bonorum* is still recognised ; also Ordinance No. 23 of 1856 ; Ordinance No. 14 of 1864 ; Pawnbrokers' Ordinance No. 22, of 1872, No. 32 of 1897.

The Negotiable Instrument Ordinance No. 30 of 1855 is contained in an edition of laws, 1905.

Mauritius Ordinance No. 12, of 1871, Art. 8, enacts that persons holding dock warrants for delivery of goods shall be deemed to be true owners of goods described therein and can give a valid title to goods in that warrant by contract of sale. Ordinance No. 15, of 1894, Arts 1, 2, 4, deals with reputed ownership of goods pledged when the holder has possession of them in his stores or vessels or a warehouse¹.

The Contract of pledge², when the pledge has been given by a trader or by a person who is not a trader in a transaction of a commercial nature, may be proved by writing or in any manner provided by the Code of Commerce, Art. 109.

The Seychelles.—The Seychelle Islands were captured by the British in 1815. The Code Civil, the Code of Civil Procedure and the Code of Commerce, which were in force in Mauritius, became the law of this Island. In this Island the Codes of Napoleon prevail as law. French authorities are freely cited in these courts. In 31st August, 1903, Letters Patent were issued declaring the Seychelle Islands a colony. The Sey-
chelles.³

The following laws of Mauritius are applied to this colony : the Fundamental Law, Mauritius Ordinance of 1853 ; amending provisions of the Mauritius Ordinance No. 14, of 1864 ; Mauritius Ordinance No. 30 of 1855, dealing with negotiable securities.

¹*Bankruptcy Law*, by Newton George.

²Commercial Pledges, No. 10, of 1871.

³*Revised Laws of Seychelles*, by F. A. Herchenroder, pub. 1904.

Trinidad and
Tobago.

Trinidad and Tobago.—The sources of the law are both Spanish and English. Trinidad was acquired by conquest in 1802; Tobago was given in 1814 by the Treaty of Paris. They became one colony by Royal Order in Council in 1888. The French historian, M. Piere Gustav Louis Borde, referring to the Articles of Capitulation of Trinidad on February 18th, 1797, between the Spanish governor and General Sir Ralph Abercromby, says there is no stipulation to retain Spanish law. When Trinidad became a British possession in 1797, the common law of the colony was Spanish.

The Mercantile Ordinance No 61, of Consolidated Laws of Trinidad and Tobago, 1902 (sec. 2) enacts that 'No contract, agreement or promise made or entered into by any person, by words spoken or by way of writing not being a specialty, shall be of any force or effect in law or shall bind any party there, unless such agreement or promise shall be founded upon some valuable thing or consideration sufficient according to the principles of the law of England to support the same against the party sought to be charged therewith.' Sec. 3 'Nothing herein contained shall extend, alter or affect the law with respect to any contract, agreement, promise or obligation contained in any speciality.' *N.B.*—The English Doctrine of Consideration is made applicable by enactment in mercantile transactions.

In Trinidad, Ordinance No. 62, Consolidated Laws, 1902, as amended by Ordinance No. 31, of 1907, deals with negotiable instruments.

The Sale of Goods Ordinance No. 37, of 1895, applies.

The Bill of Sale Ordinance No. 63 (sec. 10) enacts that every mortgage or bill of sale made or given in Consideration of any sum under £30 shall be void if not registered.

¹ Picton's Case, 1804—1812, *British Colonies*, Vol. I, 534;
30 *State Trials* 225-960; *Laws of Trinidad and Tobago*,
Burge, *Colonial Law*, Vol. I. 1902.
p. 147; Howard's *Law of*

The Pawnbrokers' Ordinance No. 182 is in force.

There is an Ordinance No. 35 giving remedies to creditors against the property of their debtors. Sec. 2 avoids feigned and covinous and fraudulent gifts, grants, alienations of lands and goods, contrived of malice, fraud or covin. All covinous gifts and grants are void. Sec. 3 is a proviso as to conveyances for good consideration and *bona fide*. 'Anything herein contained shall not extend to any estate or interest in lands made or conveyed upon good Consideration and *bona fide* to a person not having at the time of such conveyance knowledge of such covin, fraud or collision.' The wording of 13 Eliz., c. 5, has been followed closely and English cases are cited.

The law as regards real property has been English ; the Common law the equity, the practice and the Statute Law are now substantially English.

There is a local Statute of Frauds, No. 4, of 1844.

The registration of deeds and other documents is regulated.

The Judicature Act is adapted to the requirement of the colony and all equitable claims and defences available in England are available in the colony (sec. 17).

St. Vincent.—By the Treaty of Paris, St. Vincent was ceded to the British Government in 1763. By proclamation St. Vincent, Grenada, Dominica, Tobago and the Grenadines were formed into one Government. The Common Law of England and Statute Law, so far as it was applicable, have been introduced by proclamation and Letters Patent. The Statutory Law of the colony consists of Acts and Ordinances, and partly of Regulations. Ordinance No. 3, of 1895, and No. 1, of 1907, deal with negotiable instruments. Sec. 27 deals with consideration in bills and notes.

The Bankruptcy Amending Ordinance of 1889 applies.

The Doctrine of Cause obtains in this colony.

THE DOCTRINE OF CAUSE OBTAINS IN BRITISH PROTECTORATE.

Egypt¹

No code of Egyptian laws has come down to us. Diodorus names a series of Egyptian kings who were law-givers ending with Amasis (Ahmosi II) and Darius. Frequent reference is made in inscriptions to customs and laws which were traditional and were codified in sacred books. Special regulations were issued by royal decree as cases of difficulty arose. A fragment of such a decree was issued by a king of the 18th Dynasty. The papyri writings contain various enactments of Ptolemy and Euergetes II. In the time of Ptolemy, matters arising out of native contracts were decided according to native law by a travelling court, representing the king. Disputes were decided in accordance with the law of the country. The Greek Code was based on royal decrees.

Contracts were made in public before witnesses and written on papyrus. From the time of the 25th Dynasty there is a great increase in written documents of legal character, *e.g.*, respecting sales, loans, etc., on account of changes in the law. After the reign of Darius there is a complete break, until the time of Alexander. Under Ptolemy Philadelphus Greek documents were numerous; under Euergetes II demotic contracts are numerous.

Herodotus gives a report of a trial which shows the legal procedure (Egypt II, 60). The complainant set forth his case in writing, giving particulars and the amount of damages demanded. The defendant filed an answer to the claim, denying or demurring to each point raised. The papers which are known as pleadings were prepared outside the court and were presented

¹W. S. Vaux, *Ancient History*, revised by Sayce; *Herodotus*, Books I-III, by Sayce, 1883; *The Empires of the East*; *The Land of Egypt*; Plutarch; *Concerning Isis and Osiris*, Diodorus; J. H. ressted, *Ancient Records of*

Egypt, secs, 190, 535, 773. II—54, 671. III,—45-367. IV. —410; Morison, *History of Egypt, Egyptian Civilisation*; Maspere, *Ancient Egypt and Assyria*; Rawlinson, *Story of Egypt*; Sayce, *Ancient Empires*, pp. 43-46.

to the court for approval. The witnesses were heard, and written judgment was given.¹

In Egypt contracts were reduced to writing.² Contracts were unilateral.

It seems that mutual obligations were not known to the ancient Egyptians. Sale consisted in exchange of values. *Possession* was transferred to the purchaser. This was so in Roman law. Contracts were concluded before the prince and the chief official staff of the temple. Adolf Erman gives a specimen of a contract³.

A contract was binding, not on account of the form in which it was made, but on account of the expression of deliberation as shown in acceptance of the contract. Revillout⁴ writes that the vendor gave a warranty of title to the property he conveyed.

There was a system of land registration, by which a species of title-deed was created. Ancient Egyptians had many forms of pledging goods. Some times all the goods belonging to the pledgor were secured for loan. Revillout⁵ says that mortgage in Egypt consisted in exchange of uses. The owner parted with right of possession for the loan ; and if the loan was not paid in time, the lender had to obtain an order from the Court to foreclose.

Witnesses were required in transactions of sale and mortgage. A pledge could be created without possession. In Egyptian law a banking system was developed⁶, ideas of partnership were foreshadowed, one party furnishing capital and the other giving his labour.

Marriage was a contract between two parties. Revillout⁷ gives an account of the institution of marriage.

¹ Reports of Diodorus, 176.

² Revillout, *les obligations en droit Egyptien*, Paris, 1886.

³ *Life in Ancient Egypt*, p. 145, London, 1894 ; for forms of contract see *Zehn-Vertrage aus dem mittlerem Reich*, by Adolf Erman.

⁴ Op. cit., p. 16.

⁵ Op. cit., p. 193.

⁶ *The History, Principles and Practice of Banking*, by J. W. Gilbert, new edition, revised by Ernest Sykes 1911, Vol. I, pp. 2-3.

⁷ Op. cit., p. 41.

Modern
Egypt.¹

Modern Egypt.—There are four judicial systems in Egypt. Two of them apply to Egyptian subjects only, one to foreigners only, one to both foreigners and natives. Foreigners are exempt from the jurisdiction of native courts. Jurisdiction in civil matters between foreigners of different nationalities is not exercised before consular courts. In 1876 a Mixed or International Tribunal was established to supersede consular courts. The Mixed Tribunals employ a code based on the Code Napoleon with such modifications from Mahomadan law as are applicable to their case. Cases are conducted in Arabic, French, Italian and English. Since April 17th, 1905, English has been declared the judicial language².

The Egyptians are governed by two systems of laws: (1) The Mehkemehs or Court of Kazi; (2) Native tribunals. The Courts of Kazis judge all matters relating to status, *e.g.*, marriage, and are governed by law founded on the Koran. The Grand Kazi must belong to the Hanafi sect.

Lord Cromer says this system is ill-adapted to meet the special needs of the country³. Sir John Scott in 1891 made suggestions for modifying the system. In 1904 more important modifications were introduced.

Sir Aucland Colvin says: "It is through the triumph of the spirit over the letter that the West escaped from bondage. There can be no greater impediment to the evolution of a community than to be compelled to maintain in the changing relations of social life religious ordinances and codes, those 'weak and beggarly elements'

¹E. W. Lane, *Modern Egyptians; Official Reports*, by Sir H. D. Wolff; Lord Cromer, *Modern Egypt*, 2 Vols., 1908; Alfred Milner, *England in Egypt*, 1904; Sir A. Colvin, *The Making of Modern Egypt*, 1906; J. H. Scott, *Law Affecting Foreigners*

in Egypt, Edinburgh, 1907; *The Egyptian Codes*, 1892; H. Lamba, *De l'Evolution de la Condition Juridique de l'Européen en Egypt*, Paris, 1895.

²*Encyclopædia Britannica*. (new ed.).

³*Egypt*, No. 1, p. 33 (1904).

which, suited as they have been to generations past, have ceased to be appropriate to the needs and circumstances of a later hour.¹"

The law of Egypt was codified. The Civil Code of 1892 is based on the French Civil Code. Hence the Doctrine of Cause is accepted and the English Doctrine of Consideration is not applied in Egypt.

The Doctrine of Cause is accepted in these colonies Summary. and protectorates of Great Britain. The word cause is used with the meaning of French law. The contract is complete by offer and acceptance, with the addition of the requirement of cause. But in these possessions we notice the gradual influence of the English system. The local legislatures have power to pass statutes. In commercial matters the law of England is followed. The English banking system is introduced in preference to the mercantile system of France.

In the law of property the spirit of English law is embodied and in some colonies the Sale of Goods Act and the Bills of Sale Act are introduced. There are statutes corresponding to 13 Eliz. c. 5 and 27 Eliz. c. 4.

The system of registration is introduced and rules of equity and good conscience indirectly introduce the English Common Law by means of decisions.

¹ *Making of Modern Egypt*, p. 412.

CHAPTER XIII

COMPARISON OF THE DOCTRINE OF CONSIDERATION IN ENGLISH AND GERMAN LAW.

In Germany¹ the law of Rome was received in 1495 A.D. and was regarded as the common law of the land. This law was mainly that of Justinian elaborated by commentators. Chung Hui Wang says its reception "was only as a supplement to the local customary law ; it came to the aid of particularism. It was in the department of the Law of Obligations that Roman law exerted its greatest influence."

At the close of the Middle Ages, writes Vinogradoff, there was no German law as a unity. There were many local customs. Roman law was received owing to political causes ; this legal system was subordinated to the idea of the State towering over individuals or classes and free from the intermixture of private and public interests. Roman law satisfied economic requirements. Though the conditions of trade and industry in the Europe of the 14th century have changed and are quite different from what they were in the Roman Empire, yet the result of experience in applying legal principles to business is still useful. This is seen in the law of contracts. From the jurisprudential point of view the scientific value of Roman law cannot be contested. The Doctrine of Cause is the keystone of that system.

Grueber says it was thought that Roman law was published by the Emperor and therefore binding on

¹R. Schroder, *Deutsche Rechtsgeschichte*, 1889 ; Brunner, *Grundzuge der Deutschen Rechtsgeschichte*, 1887 ; J. Bryce, *The Holy Roman Em-*

pire, 1904 ; Jansen, *Geschichte der Deutschen*, Vol. I, 1890 ; Stobbe, *Geschichte der Rechtsquellen*, 1860-64.

all the countries of Christendom. But Herman Conring, of Norda in East Frisia, was the first to point out that it was a mistake to take Roman law as the law of Germany promulgated by the Emperor¹. He established in his book, *de Origine Juris Germanise*², that *Corpus Juris Civilis* was never published in Germany as law; on the contrary, it was gradually introduced in the 15th century to the universities and afterwards was applied to Courts of Justice. Roman law as such was not the law of the country. The law of nature had a prominent place. Savigny³ maintains that the contents of the law, so far from being arbitrary, are the necessary result of the whole history of the nation, like the language of the people which has grown up with the people itself as an integral part of its national character. He did not favour Codification because he held that the time was not ripe to introduce a code into Germany. He favoured the historical school of jurisprudence.

In 1849, Article XIII. 59, of the new Constitution, declared that bills of exchange and civil procedure should be regulated by federal law. There were State laws binding on the State alone, and after the North German Confederation was established in 1867, they were declared federal laws. In 1862 a Conference met at Dresden to draft an uniform Code of Obligations; that draft was ready in 1866, but did not receive the royal sanction. The Constitution of 1867 [Art. XIII. (4)] enacted the Law of Obligations to be within the competence of federal legislature. On April 16, 1871, this provision was embodied in the constitution. Gradually other matters were included to be within the control of Federal Government, and on the 12th December, 1873, it was declared that the Reichstag should legislate on all questions relating to civil law.

¹German Civil Code, p. 31.

²Published in 1643.

³In *Avocation of Our Age for Legislation*. p. 131.

The Law of Obligation¹ is taken from the draft which the Conference at Dresden had proposed in 1866. Dr. Schuster says, "It is not sufficient to refer to the provisions of B. G. B. (Civil Code) and H. G. B. (Commercial Code) or other Imperial statutes of Germany in order to find out the law on certain points; but it is necessary to enquire further into: (1) any State law which may be enacted in connection with the subject of the inquiry as supplementary provision; (2) whether any Imperial customary law affects the particular subject; (3) whether, in the event of the subject being one which may be affected by State law, any local customary law relating thereto is in existence."

Prof. Maitland says, "The German Civil Code is the most carefully considered statement of a nation's law that the world has ever seen, and the German people are able to face modern times with modern ideas, modern machinery and modern weapons." Dr. Pearce Higgins says the German Civil Code is a standing object-lesson to all States that are looking forward in the future to a scheme of codification².

The German Civil and Commercial Code³ came into force 1st January, 1900.

Manifestations of the human will, such as are intended to create an effect recognised by law, are called Acts-in-law.

¹Dernburg's *Bürgerliches Recht*; Planck's ed. of *The Civil Code*; Staub's ed. of *The Commercial Code*; Neumann's *Hand-Ausgabe of the Civil Code and Introductory Statute to History of Germanic Law*; Brunner, *Deutsche Rechts-Geschichte*; Savigny, *Avocation of Our Age for Legislation*, trans. by Hollo-way; Grueber's *Introductory Essay*, trans. by J. C. Ledie; Sohm's *Institutes of Roman*

Law; Salmond's Article on Law of Nature, XI. L. Q. R. 121.

²*Journal of the Society of Comparative Legislation*, No. XIII. p. 87.

³Schuster's *Principles of German Law*, 1907, p. 28; *The German Civil Code*, by Chung Hui Wang, 1907; *The German Civil Code*, by Loewy, 1909, p. 328; *The German Commercial Code*, by Schuster.

The term 'obligation' denotes a relation between two persons which entitles one of them to claim from the other some act or omission recognised as capable of producing a legal effect. The German word for obligation is a free translation of *Schuldverhältniss*; literally it means obligatory relation.

'Glaubiger' means a person who is entitled to the performance of an obligation, a creditor. 'Schuldner' means a person who is under obligation to a debtor; in English law the words creditor and debtor have a restricted meaning.

An act-in-law is constituted by concurrent declaration of at least two parties and is called an agreement (*Vertrag*) whether any obligation arises under it or not. An agreement creating an obligation is termed an obligatory agreement in German law and contract in English law.

An abstract agreement is one by which one of the parties incurs a liability without reference to the reasons or motive inducing him to incur such liability. In English law it is necessary to have a deed to make such an agreement binding; but in German law the abstract nature of an agreement is not void even though it is not under seal. The English rules about deeds are not accepted in the German Civil Code; there are sufficient safeguards in German law to prevent parties from entering into rash promises. The English Doctrine of Consideration does not prevail in German law because it sets up an external standard and does not make investigation into the real intention of the parties.

(a) Certain classes of acts must be authenticated before a judge or public notary and witnesses as required by German statutes.

(b) There are certain acts which must be embodied in one or more documents. In contracts relating to real rights, certain formalities must be observed.

In English law the view is that where one, by his words or conduct, causes another to believe the exis-

tence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring, against the latter, a different state of things as existing at the same time. In German law it is assumed that the party really intends the consequences of his act. A discrepancy between real and apparent intention occurs.

(a) When the expression of intention is not seriously meant ; or

(b) When the declaration does not express what is really intended to be declared.

A declaration of intention is not void simply because the declarant has made a secret reservation of not willing the matter declared. The declaration is void if made to a person who is aware of the reservation¹.

Hence in German law an agreement does not require consideration in the English sense of the word ; it requires a serious and deliberate intention to enter into a contract to create liability. A declaration of intention not seriously intended, which is made in the expectation that it will be understood not to be seriously intended, is void. (Sec. 118).

In German law contracts are verbal or written. In English law contracts are divided into simple contracts and contracts under seal.

For the validity of a contract whereby an act of performance is promised in such a manner that the promise itself creates an obligation (*e.g.* a promise of debt) a written statement of the promise is necessary unless some form is prescribed (sec. 780). If the acknowledgment or promise relates to an agreed account or compromise or is made by a mercantile trader in connection with a mercantile business, writing is not required. There is no document which is valid by the mere presence of a seal, as in English law ; but there are certain notarial documents which are valid on account of other formalities.

¹German Civil Code, sec. 116.

A.—RULES IN THE LAW OF CONTRACT.

RULE I.—Offer and acceptance make a contract binding between the parties ; nothing more is required.

An offer cannot be withdrawn in German law ; because an agreement is binding without reference to reason or motive ; a binding agreement results from consent of the contracting parties.

In English law an offer may be withdrawn before it is accepted. A simple contract must have valuable consideration.

A negotiable instrument is a document, the lawful holder of which can claim the performance of the obligations contained in it. Consideration in negotiable Instruments.

By indorsement of an instrument all rights arising therefrom are transferred to the indorsee¹. Any written order by which a mercantile trader is requested to pay or deliver to the order of another a sum of money or a negotiable instrument or any fungible thing, provided that such payment or delivery is without any condition and is transferable by indorsement, constitutes a negotiable instrument². Bills of lading, carrier's receipts, warehouse receipts issued by any establishment licensed by the State for that purpose, bottomry bonds and policies of insurances against risks of carriage can be transferred by endorsement, if made payable to order³.

The maker is bound to perform only upon delivery of the instrument. The ownership is acquired by delivery even if the bearer is not entitled to dispose of it⁴.

¹German Commercial Code, sec. 364.

²Ibid. sec. 363.

³German Bills of Exchange Code, 1897, sec. 39.

⁴German Civil Code, sec. 797.

(a) In English law the list of negotiable instruments is not so extensive as in German law ; there are certain documents, such as bills of lading and dock warrants, which are made negotiable by the Factors Act, 1889 (secs. 2 and 9) and certain legal consequences arise from the transfer of them but they are never regarded as negotiable instruments as in German law ¹.

(b) The holder must acquire rights under the instrument *bona fide* and for value in English law ; that is not required by German law.

(c) The holder has a perfect right to restrict the negotiability of a cheque. The Bills of Exchange Act, 1881 (sec. 81), enacts that where a person takes a crossed cheque which bears on it the words 'not negotiable', he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. There is no such rule in German law ; the law as to cheques is regulated by State legislation.

(d) If a document is issued "payable to A or bearer," it is payable to bearer ², but such a document is not a negotiable instrument at all in German law.

A cheque and mercantile delivery orders are not bills of exchange in German law. The rights of the holder of a cheque under German law are more limited than the rights of the holder of a cheque in English law, because in German law, if the cheque is dishonoured, the holder has no rights against the drawer as such, and has only such rights against the immediate predecessor in title ; in English law the holder has the same right of recourse as the holder of a dishonoured bill of exchange.

A bill of exchange is a mercantile order to pay, having specific characteristics. It differs from other classes of mercantile orders to pay or deliver in the following points :

¹German Commercial Code, sec. 363.

²Bills of Exchange Act, 1881, sec. 8 (2).

- (1) The drawer need not be a mercantile trader.
- (2) There must be stated in the bill that it is a bill of exchange.
- (3) There must be stated a fixed sum of money to be paid.
- (4) The time of payment and the place where it is made payable must be set out.
- (5) The intention must be to discharge the bill by one single payment on the date fixed or at sight ¹.

The liability of every party to the bill is the result of a unilateral act and the acceptor is bound to pay the amount to the lawful holder at maturity, quite independent of the contractual relation between him and the drawer. A drawer and every indorser will be liable to pay the amount to the holder if the bill is dishonoured, quite independent of the contractual relation between the drawer and payee. In English law the holder has a right of recourse in the event of non-acceptance. The Bills of Exchange Act, 1882 [sec. 43 (2)], enacts that when a bill is dishonoured by non-acceptance an immediate right of recourse against the drawer or indorser accrues to the holder and no presentment for payment is necessary. The right of immediate recourse arising from non-acceptance is exceptional and does not exist in German law. Under continental codes the holder can protest the bill for non-acceptance, and demand security from the drawer and indorsers. In German law there is no such rule as in English law ². But if the acceptor is insolvent, the holder can claim security from him ³. It is not so in English law.

In German law if a person has issued an instrument in which he promises to perform an act in favour of the bearer of the instrument, the bearer may require him to effect the performance, unless he is not entitled

¹ German Bills of Exchange, sec. 4.

² German Exchange Law, Arts. 25-28.

³ W. O. sec. 29.

to dispose of the instrument. The maker is released from his obligation by performing in favour of a bearer, even though the latter is not entitled to dispose of the instrument¹.

The German Civil Law (sec. 657) enacts that a person who by public notice announces a reward for the performance of an act, is bound to pay for the reward to any person who has performed the act, even if he did not act with a view to the reward. The promise of the reward must be made seriously. In English law such an offer of reward is binding when the party does not act after knowing that a reward is offered; in German law a unilateral act is binding and if the other party has performed the act without knowing, still he is entitled to the reward.

The assignment is complete in German law as soon as the agreement between assignor and assignee is complete, and priorities depend on the dates of several assignments; in English law notice must be given to the debtor in order to complete assignment as against third parties. In German law contract of assignment may be verbal or written. The assignor must, on demand, execute in favour of the assignee a publicly certified instrument of assignment (sec. 403). A claim may, by contract with another person, be transferred by the creditor to him. The assignee takes the place of the assignor as soon as the contract is complete (sec. 398). The German term for an assignment of rights is *Abtretung*.

RULE II—It is quite unnecessary for the promisor to obtain any benefit from the promisee or that the promisee should have suffered any loss or detriment by acting on the promise. The consent of the parties is quite enough to make a promise binding.

In the German view the standard is the intention of the parties to be bound; while in English law there

¹German Civil Law, sec. 793.

must be something to show besides the concurrence ; there must be an objective standard to show that the parties have agreed. This can be done by the profit which the promisor was to derive or the loss which the promisee has suffered by relying on the promise. This way of looking at the doctrine makes the difference between English and German law. The standard of German law is internal, while of English law it is external; and even if the parties have genuinely agreed, but there is no detriment to the promises, it is no enforceable promise.

RULE III.—An act of performance in favour of a third party may, by contract, be stipulated for in such manner that the third party acquires a direct right to demand the performance.¹

If in a contract one party binds himself to satisfy a creditor of the other party without assuming the debt, it is not to be presumed in case of doubt that the creditor shall acquire a direct right to demand satisfaction from him (sec. 329). If in a contract for life insurance or annuity, payment of the insurance or annuity to a third party is stipulated for, it is to be presumed, in case of doubt, that the third party shall acquire a direct right to demand the payment (sec. 339). If the performance in favour of the third party is to be effected after the death of the person to whom it was promised, in case of doubt the third party acquires the right to the performance upon the death of the promisee. If the promisee dies before the birth of the third party, the promise to perform in favour of the third party can be revoked or altered only if the right to do so has been reserved (sec. 331). If the promisee has reserved to himself the right of substituting another for the third party named in the contract without the consent of the promisor, this may also be done in case of doubt by disposition *mortis causa* (sec. 332). Defences arising from the contract are available to the promisor even as against the third party

¹German Civil Law, sec. 328.

(sec. 334). Where goods are carried by land, the agreement between the sender and the carrier is in the nature of an agreement for the benefit of the consignee (*i.e.*, the third party). After the arrival of the goods at the place of delivery, the consignee is authorised to enforce the rights arising out of the contract of carriage provided he has performed his own obligation.¹ The promisee may demand performance in favour of the third party even though the right to the performance is in the latter (sec. 335).

In German law an obligation inures in favour of another without his being aware of the right conferred upon him or that his acceptance should be a condition precedent. In English law this is true only when the promise is under seal; in case of an oral promise, it is not binding, till consideration has been given.

In English law no stranger to a contract can enforce it. But the same result can be arrived at by means of a trust.

In German law rules as to conduct of business on behalf of another without his request resemble the rules in Roman law as to *negotium gestio*: and in maritime assistance and salvage cases similar rules apply. In English law if any person intermeddles against the will of another, he cannot make himself creditor of that person even though benefit is received. The Merchant Shipping Act, secs. 544-571, respects claims for salvage and for saving life. In German law the saving of life is not taken into account, unless the ship and cargo are also saved.

RULE IV.—Disproportionate price is not in itself sufficient to avoid the contract.

If the disproportion is so great that the purchase-money exceed double the value of the thing sold, a legal presumption of mistake or fraud arises of which the buyer may take advantage to avoid the contract

¹ German Commercial Code, sec. 435.

The buyer may, by contract, waive the benefit of this right. The *seller* cannot dispute the contract on the ground of undervalue. Agreements are to be interpreted in accordance with good faith, having regard to the customs of daily life.

This rule resembles the English rule, where inadequacy of consideration is no ground to set aside a contract; if the inadequacy is so gross as to shock the conscience, the Court will declare that there was no real consent between the parties.

The German Civil Code (sec. 138) enacts that a juristic act is void whereby a person profiting by the difficulties, indiscretion or inexperience of another causes to be promised or granted to himself, or to a third party for a consideration, pecuniary advantages which exceed the value of consideration to such an extent that, having regard to circumstances, the disproportion is obvious.

RULE V.—The exercise of a right which can only have the purpose of causing injury to another is unlawful (sec. 226).

The subject matter of obligation must be definite, possible and lawful; and not opposed to the public policy of German law (sec. 134). A juristic act which is 'contra bonos mores' is void (sec. 138).

No obligation is created by gaming or betting. What Wagers. has been given by reason of gaming or betting may not be demanded back on the ground that no obligation existed.

The above rule applies to an agreement whereby the losing party, for the purpose of satisfying a gaming debt or a bet, incurs an obligation towards the other party (sec. 762). A lottery contract or a raffle contract is binding, if the lottery or the raffle is ratified by the Government (sec. 763).

If a contract purporting to be for the delivery of goods or negotiable instruments is entered into with

the intention that the difference between the price agreed upon and the exchange or market price at the time of delivery shall be paid by losing to the winning party, the contract shall be deemed to be a wagering contract. This applies also if only one of the parties knows or ought to know of this intention (sec. 764).

In German law formerly distinction was made between betting and gaming transactions, but the civil code abolishes the distinction. Insurance, annuity, stock and produce bargains are regulated by separate laws.

In English law the amount of a gaming or wagering loss cannot be recovered after payment. If a negotiable instrument is issued in payment of a wagering debt a distinction is drawn between wagers that are illegal and wagers which are merely void. In the former case the holder has to prove: (1) value given for the instrument; and (2) that he did not know that the consideration for which it was issued was unlawful. In the latter case the holder is presumed to have given value and the fact of his knowing that it was issued to pay a wagering debt, does not affect his right¹.

Impossibility.

A contract for an impossible performance is void (sec. 306). If one of the acts of performance is impossible *ab initio*, or if it subsequently becomes impossible, the obligation is limited to other acts of performance.

The German law is that the debtor is excused in so far as the performance of his obligation has become impossible through circumstances for which he is not responsible, and which arose after the obligation was incurred (sec. 276). If the circumstances occurred before the creation of the obligation, the contract is void (sec. 305). This rule is based on the Swiss code.

Inability to perform on the part of the person bound is insufficient. Impossibility must exist before and at the time of the conclusion of the contract.

¹Bill of Exchange Act, sec. 30

If the performance due from one party under a mutual contract becomes impossible in consequence of a circumstance for which neither he nor the other party is responsible, he loses his claim to counter performance (sec. 323). A person who was concluding a contract for an impossible performance knew or ought to have known that it was impossible, is bound to make compensation (sec. 307).

In case of partial impossibility the creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation if he has no interest in partial performance (sec. 280).

In English law, impossibility of performance arising subsequently to the making of an obligation does not put an end to liability in the absence of an express or implied contract to do so, *e.g.*, if the parties mean to refer to any unforeseen cause which might prevent the loading of a cargo, they must expressly say so ; otherwise they will be liable.

In German law in certain cases where the debtor is liable without reference to any default, the performance is excused if it was prevented by *vis major*, because non-performance nor incompleteness of the contract could not have been avoided even if the party had used the highest degree of diligence.

A marriage brocade contract is void, and no obligation can arise from a promise to pay a fee for information of an opportunity to enter into a marriage or for the procurement of the conclusion of a marriage ; if money is paid on account of the promise, it cannot be recovered (sec. 656).

A juristic act which is contrary to a statutory provision is void, unless a contrary intention appears (sec. 134). Prohibition may be from Imperial or State law, *e.g.* :

(1) an agreement for compound interest which is not excepted ;

(2) any agreement dealing with a right expected to arise on the death of a living person ;

(3) restraint or alienation of property.

An agreement for permanent separation between spouses is contrary to good morals and is forbidden.

If the purpose of an act of performance was specified in such manner that its acceptance by the recipient constitutes an infringement of a statutory prohibition, or is *contra bonos mores*, the recipient is bound to make restitution. The claim for return is barred if the person performing is *in pari delicto*, unless the performance consisted in the incurring of an obligation ; what has been given for the performance of such an obligation may not be demanded back (sec. 817). If objects are delivered in discharge of a non-existent obligation, they can be recovered.

In English law, actions for money had and received, or money received for the use of another, can be allowed under similar circumstances.

Void.
Voidable.

In German law the word void has the same meaning as in English law, except in reference to marriage. If part of a juristic act is void, the whole juristic act will be void, unless it is to be presumed that it would equally have been entered into if the void part had been omitted (sec. 139). Void means inoperative for all purposes, from the beginning. If the void juristic act is confirmed by the person who entered into it, the confirmation is deemed to be a renewed undertaking (sec. 141).

A voidable contract is valid until it is avoided and then it is deemed to have been void from the beginning. This is also the meaning in German law.

RULE VI.—A party may incur liability without reference to the reason or motive for inducing him to incur liability.

An agreement by which performance is promised absolutely, or by which the existence of an obligatory relation is acknowledged, must be in writing, unless

the promise or acknowledgment is in reference to an agreed account or compromise or by a mercantile trader relating to mercantile contract (sec. 780).

Agreements in restraint of trade are regulated by the German Commercial Code; sections 74-76 are similar to the rules of English law. An agreement between an employer and his employee, limiting the trading activity of the latter after leaving his employment, only binds the employee in so far as the restraint imposed as to time, place and nature of the trade, are so limited that they do not embarrass the future of the employee unduly (sec. 74); nor can such restraint be imposed for more than three years after the date of leaving the service.

Restraint of Trade.

In German law special rules as to maintenance and chanperty do not prevail.

If several acts of performance are due in such a manner that only one of them is to be done, the right to elect belongs to the debtor in case of doubt (sec. 262).

Alternative Acts.

In German law unjustified benefits and voluntary services give rise to liability to pay, because a person who has benefited at the expense of another, by mistake or accident, is bound to restore such benefit or compensate the other for his sacrifice.

Failure of Consideration.

Unjust benefit is a benefit received without sufficient legal ground. A person who receives a benefit at the expense of another without sufficient legal ground must restore any benefit that is received at the expense of the other person. The value of an act of performance done for the purpose of fulfilling an obligation may be demanded back, even if there was a defence to the claim whereby the enforcement of the claim was permanently barred (sec. 813). But it cannot be demanded back if the party knew that he was not bound to effect the performance, or the performance was in compliance with a moral duty or rule of social propriety (sec. 814).

In English law there must be consideration even if the contract is reduced to writing. Motive is not the same thing as consideration.

RULE VII.—An obligation is extinguished if the debtor is released from the obligation. If the creditor acknowledges to the debtor that the obligation does not exist, the obligation is waived.¹

In English law, to constitute waiver, a creditor must receive valuable consideration for so doing or there must be a deed under seal.

A smaller sum can be a good discharge for a larger sum due in German law but not in English law.

German law favours the debtor more than English law, on the subject of appropriation of payments. The debtor can appropriate payment in German law up to the last moment. In a banking account the first sum paid in must be deemed to be payment in discharge of the first debt. The creditor in English law has the right to appropriate payment at his will; not so in German law. A debtor cannot perform his obligation in part, except in the case of a bill of exchange or promissory note; the holder of such an instrument is not entitled to refuse the payment of a part of the amount.² There is no such exception in English law.

RULE VIII.—Compromise is a contract whereby the dispute (it need not be a lawsuit), or the uncertainty of the parties concerning a legal relation is ended by way of mutual concession.

Such a compromise will not be binding if the state of affairs taken as the basis, according to the terms of the contract, does not correspond with the actual facts, and if the dispute or uncertainty would not have arisen if the state of affairs had been known³.

¹German Civil Code, sec. 397.

Act, secs. 38, 98.

²German Bills of Exchange

³German Civil Code, sec. 779.

Compromise or waiver of right is called *Vergleich* in German law. The idea of compromise is in English law also.

RULE IX.—An antecedent act, forbearance or promise of one party is a valid ground for a subsequent promise of the other. The existence of a previous moral obligation constitutes such a relation between the parties as will support an express promise.

In English law the rule is that consideration must be present or future, but not past; but in German law it does not matter at all whether the ground of promise exists at the same time or afterwards, or had existed before the promise was made; because intention of the parties to be bound by the promise is all that is required to create the liability.

RULE X.—A person who is bound by a mutual contract may refuse to perform his part until the other party has performed his part, unless the former is bound to perform his part first.

If one party has partially performed his part, counter-performance may not be refused, if the refusal under the circumstances would constitute bad faith (sec. 320). A person who is bound by mutual contract to perform his part first may, if after the conclusion of the contract a serious change for the worse in the financial circumstances of the other party comes about, whereby the claim for the counter-performance is endangered, refuse to perform his part until the other party has performed his part or given security for it (sec. 321).

In German law no action can be brought upon a betrothal to carry out the promise to marry. A promise to pay a penalty in case of non-fulfilment of the promise is void (sec. 1297).

If the betrothed person withdraw from the betrothal, he or she must compensate the other party to the betrothal, or the parents or guardians of the latter,

for damage caused by having incurred expenditure in expectation of marriage. He (or she) shall compensate the other party to the betrothal for any damage sustained by the other party owing to the breach of the engagement. The damage must be made good for any outlay or obligations incurred.

In English law exemplary damage will be awarded for the breach of promise of marriage if the conduct was insulting.

In German law, if the marriage is not concluded, either party to the engagement may demand from the other the return of what he or she has given the other as a gift. The action to recover such gifts must be brought within two years (secs. 1301-1302).

An agreement to marry is a mutual agreement. Specific performance is not granted either in English or in German law. A promise by a third party to give something if marriage takes place between the intending spouses can be enforced on the marriage taking place between the parties.

RULE XI.—By virtue of an obligation the creditor is entitled to claim performance from the debtor ¹.

In Roman law there was no general rule to give damages for injury done by the unlawful act of the wrongdoer; only specified injuries to person or property created liability. The injured party got the penalty for the injury done. The idea of compensation for the injury done had not been developed; and the idea of granting specific performance was not known; indirectly the praetors granted relief by means of stipulation.

The remedy of specific performance prevails in German law and is not dependent on the presence of valuable consideration as in English law.

The compensation required to be made includes also the loss of profits. That profit is deemed to have

¹ German Civil Code, sec. 241.

been lost which would have resulted in the ordinary course of things, or according to the particular circumstances ¹.

There is no instrument of the nature of a deed in German law.

B.—DOCTRINE OF CONSIDERATION AS IT AFFECTS THE LAW OF PROPERTY AND CONVEYANCING.

RULE I.—The presence or absence of value affects the legal nature of the transaction.

In German law a gift is a contract in which there must be an offer and a acceptance. Gift.

A giving by which one from his property benefits another is a donation if both are of one mind and giving is gratuitous (sec. 515).

If giving takes place without the will of the other, the giver can require of him a declaration as to the acceptance within an adequate time fixed by him. After that time the donation is regarded as accepted if the other has not previously declined it. If it is refused, the return of the gift may be demanded ².

If the gift of money or moveables is executed forthwith, a writing is not required. Judicial or notarial authentication is necessary in case of the gift of immoveable property, or in case of promise of a gift (sec. 58).

A donor is entitled to refuse fulfilment of a gratuitous promise in so far as having regard to his other obligations, he is not in a position to fulfil the promise without endangering his own maintenance suitable to his station in life, or the duty to furnish maintenance to others imposed upon him by law (sec. 588). If the claims of several donors conflict, the claim which first arose takes priority (sec. 519).

In English law if the promise to make a gift is made, it is not binding unless under seal and specific per-

¹German Civil Code, sec. 252.

²C. Schuster, *Principles of German Law*, secs. 199 200.

formance is not granted. A gift cannot be revoked by the donor unless there is express power reserved to do so.

In German law a gift which is made in compliance with moral duty or the rules of social propriety is not subject to revocation, *e.g.*, a gift to a poor relative.

The claim to the return of a gift is barred if the donor has brought about his poverty wilfully or by gross negligence, or if ten years have elapsed since the gift was made.

In German law an agreement for a gratuitous loan binds the lender to grant the borrower the use of the thing during the agreed time. In English law an agreement for loan without consideration moving from the promisee is not binding.

By accepting mandate the mandatory binds himself gratuitously to take charge of the affairs entrusted to him for the mandator.

In English law such a promise must be under seal. In German law the mandatory is liable to make compensation if he commits a breach of duty (sec. 662).

Sale.

In German law sale means agreement to sell; it does not include the transfer of property. In English law where under a contract of sale the property in the goods is transferred to the buyer, the contract is called a sale; where the transfer of the property in the goods is to take place at a future time, or subject to some condition hereafter to be fulfilled, the contract is called an agreement to sell ¹.

A contract whereby one party binds himself to transfer the ownership of a piece of land requires judicial or notarial authentication. A contract concluded without observance of this form becomes valid in its entirety if conveyance by agreement and entry in the land register have taken place ². The ownership

¹Sale of Goods Act, 1893, sec. 1 (3).

²German Civil Code, sec 313.

of land cannot be transferred by mere contract. Entry in the land register is necessary (sec. 373). A similar provision is made in the Sale of Goods Act, 1893 (sec. 44).

German law gives a more extensive right to purchaser than English law does. The seller is bound to transfer to the purchaser the sold object free from rights enforceable by third parties against the purchaser (sec. 434). This refers to warranty of title. Earnest is deemed proof of the conclusion of a contract (sec. 336). The earnest must be returned, if the contract is rescinded (sec. 337).

The seller of a piece of land does not warrant the land to be free from public taxes and other public burdens which are not suitable to be entered in the land register (sec. 436). The vendor is under duty to deliver the purchased object free from any defect of title or incumbrance. This is not so in the English Sale of Goods Act, 1893, sec. 12. In a contract of sale, unless circumstances are to the contrary, there is: (1) an implied condition on the part of the seller that in case of sale he has right to sell the goods; (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods; (3) an implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made. The Vendor's and Purchaser's Act, 1874: (1) enacts that in the absence of a contract forty years will be sufficient for the root of title which the purchaser may require.

In German law until the delivery of the thing is given to the purchaser, the seller remains liable, and the thing sold is at his risk [sec. 446 (1)]. In English law, unless otherwise agreed the goods remain at the seller's risk until property therein is transferred to the buyer; when property therein is transferred to the buyer, the goods are at the risk of the buyer, whether delivery has been made or not ¹.

¹Sale of Goods Act, 1893, sec. 20.

In German law hire-purchase agreement takes the form of sale, subject to *pactum reservanti domoini*, till all instalments are paid. An Imperial Statute, 1893, regulates such agreements.

In German law the assignee's insolvency is not a necessary condition of the exercise of the right of stoppage in transit. The sender's right of disposal of the goods is extinguished if the letter of advice is delivered to the consignee after the goods have once arrived at the place of delivery, or if proceedings have been commenced against the carrier. In such a case the carrier is bound to obey the instructions of the consignee alone, upon pain of becoming liable to him in respect of the goods [sec. 433 (2)].

The Sale of Goods Act, 1893 (secs. 44-46), deals with the English law on this subject.

When a sale takes place, the purchaser must examine the goods immediately after delivery by the vendor and must give notice if any defect is discovered, otherwise the goods will be deemed to have been accepted notwithstanding the defect. This rule applies to goods which are obviously at complete variance with the order given¹.

Community
of Goods.

In Community of Goods the whole or certain part of the property belonging to each spouse by virtue of the adoption of *regime* becomes vested in both the spouses as co-owners in equal shares; the management of the property is left with the husband, and community comes to an end on the death of either party (sec. 1438).

In German law there is a peculiar contractual disposition called Contract of Inheritance, whereby the party, by means of contract, agrees to abandon a share in the estate of a person after his death. This is not allowed in English law.

In German law family settlements are not so frequent as in English law, but there is a peculiar system of com-

¹Commercial Code, secs. 377-378.

munity of goods on marriage. Real property settlements are rare, because permission is required from the government to create them. There is no institution of trust and the property does not become vested in a trustee for a beneficiary at all ; it creates only a right *in personam* against the trustee to carry out the undertaking ; the property cannot be followed into the hands of third parties for value with notice of the trust or of volunteers. This right is peculiar to English law.

RULE II.—Conveyance of property can be set aside for want of value on various grounds.

I.—A gift of property can be revoked if the donee is guilty of gross ingratitude by serious misconduct towards the donor himself or his near relations.

If the donor is killed unlawfully by the donee, or is prevented from revoking the gift during his lifetime, the heir of the donor has the right to revoke the gift unless the act was forgiven or more than a year has elapsed since the guilty conduct¹. There is no such rule in English law.

II.—Certain gifts are invalid owing to public reasons, *e.g.*, if a gift of more than 5,000 marks is made to a corporate body, or without special sanction of the government, it can be revoked².

III.—The creditors of the donor can impeach gifts or promises of gifts made in event of bankruptcy and in certain cases showing insolvency.

IV.—Where it was the intention of the donor to damage the heir or legatee, such a gift can be recovered from the donee within three years of the vesting in possession of the heir or legatee. (This is not so in English law.)

¹German Civil Code, secs.

530-532.

²Prussian A. G., Art. 67.

V.—The husband's creditors may enforce their claims against the common property in all cases: the wife's creditors can enforce their claims against the common property in certain cases only.

In English law the gift of lands or goods is void (under Statute 13, Eliz., chap. 5) if made with intent to defraud, delay or hinder donor's creditors. A voluntary settlement is voidable under the Bankruptcy Act, 1883.

If land is given to a corporation, which is not authorised to hold land, and if a gift of land is made for objects not sanctioned under the Mortmain and Charitable Uses Act, 1888, the land will be forfeited to the Crown.

The distinction between charges on immoveables and moveables is kept in German law. Charges on moveables are called *pignus* when possession remains with the debtor.

Charges on registered ships, on freight and cargo, are regulated by the German Commercial Code (sec. 679). There is no separate legislation for registration of pledges, as in the English Bill of Sale Act, 1893, because the German Code follows the Roman law in the matter of pledging chattels—that without delivery to the pledgee, there can be no pledge.

C.—OBLIGATION TO DISCLOSE THE NATURE OF THE REASON OR GROUND OF THE OBLIGATION.

I.—In German law there are special statutes regulating pawnbrokers¹.

II.—A pledge affecting a registered ship may be granted in such manner that only the maximum amount for which the ship is to be liable is specified,

¹Prussian A. G., sec. 111; Saxon A. G., sec. 51; Baden Bavarian A. G., sec. 911; A. G. sec. 29.

the determination of the claim being in other respects reserved. That maximum amount must be entered on the registered ships¹.

III.—There are certain documents relating to land which must be executed before a judge or notary and witnesses, disclosing the consideration given².

IV.—Acknowledgment of debt must be in writing. This provision is similar to the rule in English law.

¹German Civil Code, sec. 1271.

²Cf. Car II, C 3 (Statute of Frauds); § 4.

CHAPTER XIV.

COMPARISON OF THE DOCTRINE OF CONSIDERATION IN ENGLISH AND JAPANESE LAW.

Japan has had a Civil and Commercial Code since 1892. The Statute of 1875 enacts that decisions shall be given according to the written rules of law, if any, according to custom, if no such law exists, and according to the equity of each case, when no such custom exists. The Code of Japan uses two words: *Saikin*, meaning: right of action, claim, right of obligation; *Saimu*, meaning: duty of obligation; the word obligation includes right as well as duty.

The word debtor means one who is subject to *any kind* of obligation, while creditor is one to whom any obligation is due. In English law these words have a restricted meaning.

In Japanese law¹ offer and acceptance are the only elements necessary to create a binding contract; if an offer is made to be bound by a contract which the promissor has agreed to keep open for a definite time, he cannot withdraw it (sec. 521). In English law, an offer to keep it open without valuable consideration can be withdrawn. Contracts are verbal and written in Japanese law.

The Doctrine of Consideration does not obtain in Japanese law. Mere offer and acceptance constitute a binding contract². As a general rule, agreement is not

¹ Notes on the Civil Code of Japan, by Schröder; - The Civil Code of Japan, by Loenholtm; Annotated Civil Code of Japan, by J. De Becker, 1909; Japanese Commercial

Code, by Loenholtm; Code Civil of Japan, trans. by J. Motono, 1898.

² Part III, ch. 2, sec. 1, on Contract.

required to be reduced to writing. When a promise is not reduced to writing, either party can cancel it before anything is done¹.

A.—RULES OF THE DOCTRINE IN THE LAW OF CONTRACT.

RULE I.—A contract is concluded by offer and acceptance of the contracting parties and nothing more is required to make it binding.

In English law there must be in addition valuable consideration to make a contract legally binding.

The Japanese law of Bills of Exchange resembles German law. Before the introduction of this foreign system Japanese law had a kind of formal instrument which resembled a bill in the modern sense. It was called *osaka*. The present law relating to bills of exchange and promissory notes was passed in 1882. A bill does not derive its validity from the consideration or transaction on which it is based, but is binding of itself. It is not a mere evidence of obligation but embodies the obligation itself and action can be based on it. The acceptor, drawer and indorsers incur liability upon the obligation resulting from it. Japanese law does not require the insertion of the words "bills of exchange" in the instrument itself; German law requires that fact to be stated. The essential is the statement of the amount payable. An order of performance of any other act than *money* is not a bill of exchange. The payment does not depend on the existence of consideration. A bill can be drawn for a principal sum; it cannot bear interest or stipulate for the payment of any additional costs or charges. A bill can be drawn to order or to bearer. But in German law it can be drawn payable to order only. Japanese law does not recognise days of grace as the English law does. In Japanese law the validity of a bill is determined by the law of the place which is mentioned in the bill as the place

¹Part III, ch. 2, sec. 2.

of origin of that liability; and if that is not stated, the law of domicile of the person subject to the obligation will apply.

Nothing is mentioned of consideration as the essential element of contract. The Japanese law recognises the existence of contract merely from an intention expressed to create an obligation¹.

RULE II.—It is quite immaterial* that the promisor should derive any benefit from the promise or that the promisee should have suffered any detriment by acting on the promise of the other party.

In English law there must be detriment suffered by the promisee by acting on the promise of the other party.

RULE III.—If a party is bound to make a presentation to a third person in accordance with a contract, the third person has a right to demand such presentation directly from the debtor.

The right of the third person comes into existence as soon as he expresses to the debtor his intention to enjoy the benefit of the contract². A creditor, in order to preserve his right of action against the debtor, can exercise a right.

After the third person has signified his intention to enjoy the benefit, the parties to the contract cannot change or extinguish that contract. The debtor has the right to set up any defences against the third party which he would have urged against the contracting parties. (Secs. 538-539.)

RULE IV.—A contract does not depend for its validity on adequate return for the promise.

The parties are the best judges of the value of their promises. The rule of Roman law that if the price is less than half the value of the property the seller can

¹*American Law Review*, Vol. 37, p. 182, address delivered by Dr. R. Mosyima of Tokio, Japan, before New

York State Bar Association, on Jan. 20th, 1903.

²*Japanese Civil Code*, sec. 537.

set aside the sale is not accepted in Japanese law. But if there is deception or fraud along with inadequacy of value the contract will be set aside. This is also the English rule.

RULE V.—The object of contract must be definite legal, possible and not opposed to public policy.

(1) If a person is enriched without any lawful reason from the other person's services or property, resulting in a loss to that other, the duty of restitution to the extent of enrichment arises. (2) If this is the result of bad faith, restitution with interest must be made (sec. 704). (3) If the party making praestation knew at the time that no obligation actually existed, restitution will not be allowed (sec. 705); nor will restitution be granted if there was a natural obligation to pay. (4) If a person has made a praestation for an illegal cause, he cannot claim restitution of the subject unless illegality is only on the part of the person receiving it (sec. 708). (5) When the debtor has made praestation in satisfaction of an obligation before it is due, restitution of the thing praestated cannot be demanded; but when the debtor has made such praestation by mistake, the creditor must make restitution of any benefit derived therefrom (sec. 706).

Failure of Value.

RULE VI.—A motive to return a benefit done, or a promise to provide for past injury done by the promisor is a valid ground to give rise to liability.

The Japanese law regards a moral promise as sufficient ground to give rise to an action. Motive and consideration are quite distinct in English law.

RULE VII.—The abandonment of a claim or forbearance of exercise of a right for a certain time at the request of the promisor is good ground for the promisee.

This is also the English rule.

RULE VIII.—A compromise is where parties agree to settle a dispute between them by mutual concession. If it is admitted by compromise that one of the parties has the right which is the object of dispute or that the other has not that right, such right is by compromise transferred or extinguished. (Sec. 695-96.)

The peculiar rule of English law which prevents the obligation of a larger amount from being discharged by payment of a smaller sum at the same time and place has no place in Japanese law. Composition (*kyokwai*) is an arrangement made in the course of bankruptcy proceedings between the bankrupt and ordinary creditors. Composition requires the consent of the administrator.

RULE IX.—An antecedent act, forbearance or promise of one party is a valid ground for a subsequent promise of the other party.

In English law consideration may be present or future only. A past consideration is no consideration at all; this is not the rule in Japanese law. A previous moral obligation constitutes such a relation between parties as will support an express promise.

RULE X.—Mutual promises are binding.

If spouses make a special contract relating to property, it must be registered before notice of their marriage is given, otherwise it will not be set up against their successors or a third person (sec. 794).

RULE XI.—There is no instrument in the nature of a deed in Japanese law.

All contracts are binding owing to the parties having agreed to be bound.

Contracts are verbal or written.

Antenuptial contracts relating to property are required to be reduced to writing and registered.

Partnership is formed by a contract which must be signed and sealed. If it is not in writing, no legal right can arise. In this point Japanese law is stricter than European law. French law insists on contract in writing for securing written evidence only; in English law partnership can be formed by oral agreement. If any change is made in the terms, it must be in writing.

There are registers for commercial transactions in which the contract must be entered within fifteen days.

B.—THE DOCTRINE AS IT AFFECTS THE LAW OF PROPERTY AND CONVEYANCING.

RULE I.—The presence or absence of value affects the legal nature of the transaction.

A gift is where one party expresses his intention to give property of his own to another without consideration and the other party expresses his acceptance (sec. 549). A gift not expressed in writing can be rescinded by either party, except so far as performance has already been made (sec. 550).

If a gift is to be made by instalments, it ceases to have effect on the death of either the donor or donee.

A gift to take effect at the death of the donor is governed by rules about legacies (sec. 554).

In Japanese law if the buyer has given bargain money Law of Sale. to the seller, either party, before performance of the contract has begun, may rescind it. The buyer can do so on condition of forfeiting the bargain money, the seller on condition of repaying twice the amount. This is like the rule of Roman law about earnest.

Sale is complete by consent alone.

There is no idea of legal and equitable estate or of trust. If a gift is not completed, it cannot be treated as a trust. A gift is like a contract and is completed by offer and acceptance.

Trusts are treated as part of contract.

RULE II.—Conveyance, though complete, can be set aside for want of value at the instance of other persons.

A creditor may apply to a court of law for cancellation of a legal right performed by the debtor with knowledge that it would injure his creditors. But where the person deriving benefit is quite ignorant at the time of the transfer or acquisition that injury would be caused to the creditor, he will not be affected.

The above rule applies to legal rights which relate to control over property only (sec. 424). The cancellation must be effected within two years of the knowledge of the alienation of property. In other cases the act can be cancelled within twenty years after the act in question was performed.

The cancellation made on the ground of injury to creditors will operate for the benefit of all creditors. (secs. 424-26).

In English law any alienation made with intent to defeat, defraud or delay creditors, can be set aside by creditors who are so defeated, delayed or defrauded¹.

In Japanese law a creditor, till the time for payment of his claim has arrived, cannot exercise that right except by judicial subrogation (sec. 423). Future creditors cannot impeach alienations of property.

The creation of a pledge takes effect on delivery to the creditor of the thing forming its subject. The pledgee cannot allow the pledgor to hold possession of the thing pledged in his place (secs. 345-46.)

There is no instrument corresponding to Bills of Sale Act, 1882, because possession of the thing pledged must be given to the pledgee.

Bankruptcy law is based on the French Law of Bankruptcy. According to Japanese law bankruptcy is admitted among debtors who are traders. This is based on German law which applies to traders and

¹ 13 Eliz. c. 5 and 27 Eliz. c. 4.

non-traders. Japanese law has adopted French law in mercantile bankruptcy. A bankrupt (*hasansha*) is one against whose property proceedings in bankruptcy are directed. Every gratuitous disposition which the debtor makes before adjudication, but after suspension of payments or within thirty days previous thereto, in so far as it prejudices the satisfaction of the creditors is void, *e.g.*, gifts of all kinds, even those made under pretence of consideration received; it is voidable at the instance of creditors. Acts done by the debtor with intent to defraud his creditors may be avoided at whatever time done if the intention was known to that person and the act actually prejudices the creditors. The right of avoiding acts of the debtor belongs to the administrator. In the Japanese law of bankruptcy three parties have the right to make the debtor bankrupt: (1) debtor; (2) creditor; (3) Court. On this point the French, English and German systems differ because with them the Court cannot adjudge a debtor bankrupt.

If a trader suspends payment in the course of trading, he must give notice of that fact to the Court within five days, stating the cause of suspending payment. A balance sheet and books of account must also be sent to the court. In this respect the law is based on the French system. Also Japanese law provides for respite to avoid bankruptcy.

C.—OBLIGATION TO DISCLOSE THE REASON OR GROUND OF THE OBLIGATION.

I.—Ante-nuptial contracts are to be in writing before a registrar.

II.—Sale and transfer of immoveable property to be binding are to be reduced to writing.

III.—Some mercantile documents have to be in writing, before an official, to be binding, *e.g.*:—

(a) transactions whose object is acquisition for value of moveables, immoveables or securities with the intention of disposing of them for profit;

(b) contracts for the delivery of moveables or securities to be acquired from others, and transactions for acquiring such things for value in order to perform such contracts ;

(c) transactions relating to bills and other commercial instruments on credit.¹

In each of these transactions the value given is to be set out.

CHAPTER XV.

COMPARISON OF THE DOCTRINE IN ENGLISH AND AUSTRIAN LAW.

Austria has a Civil Code dating from 1st June 1811, a Commercial Code of 1863, and Bills of Exchange Code, 1850.

The German Commercial Code and Bills of Exchange are in force in Austria.

The Civil Code¹ is based on the old German laws and the ancient laws of kingdoms like Bohemia and the countries which formed the Austrian Empire.

In Austrian law obligation is created by offer and acceptance of that offer.

There is no requirement of consideration in the English sense of the term.

Whoever declares that he will cede his right to someone, that is, that he will allow him something or give him something, makes a promise; if the other accepts the promise validly, a contract is formed by the coinciding will of both parties². A verbal promise must be accepted without delay. If a promise is made in writing, it will depend on both parties being in the same place or not. If they are in the same place the law allows twenty-four hours to make acceptance; if they are in different places, within the time required for answering acceptance of the proposal. An offer to keep the promise open cannot be withdrawn within the time stated.

In English law an offer can be withdrawn until it is accepted.

¹*Commentary to the Civil Code of Austria*, by Krainz; Dr. Joseph Ungar's *Austrian*

Private Rechts, 1876.

²*Austrian Civil Code*, sec. 861.

A.—RULES OF THE DOCTRINE IN THE LAW OF CONTRACT.

RULE I.—A contract is completed by consent of the contracting parties. Offer and acceptance are the only elements necessary to make a promise binding.

There is no requirement of consideration or *causa* to make a contract binding.

Bills of exchange and promissory notes are instruments of credit, just as in English and German law.

RULE II.—The idea of detriment resulting to the promisee or advantage to the promisor is not an essential element of contract.

It is not so in English law.

RULE III.—The general rule is that a contract is binding only between the contracting parties, except in cases when it is the intention of both parties to give the benefit of the contract to some third person.

In English law no stranger to the contract can enforce the contract. But in Austrian law it is not so.

RULE IV.—If the inadequacy of value is to the extent of one-half in any bilateral contract, the injured party has the right to call upon the other party to make up the deficiency or rescind the contract at that other's option. That right can be waived beforehand¹.

English law will not set aside a contract on the ground of inadequacy alone.

RULE V.—The contents of a legal act must be allowed as valid. If the object of legal act is not allowed, the realisation of contract cannot be enforced.

One cannot ask back what was given to cause something impossible or not-allowed².

Failure of
Considera-
tion or
object.

¹ Austrian Civil Code, secs.
934, 935.

² Ibid. sec. 1174.

RULE VI.—A motive to return a benefit already done is sufficient reason to make the promise binding in law.

In English law motive is not the same thing as consideration moving from the promisee.

RULE VII.—Abandonment of a right on forbearance to exercise a just claim will be valid for the promise.

This is allowed in English law also.

RULE VIII.—Parties may compromise their disputes and the promise given to do something in satisfaction of the whole claim will be valid.

This is true of English law also. The technical rule that part payment cannot be a satisfaction of the whole is not adopted in the law of Austria.

RULE IX.—A promise given after an act, forbearance or promise is accomplished, is valid.

In English law consideration must be present or future and not past. In Austrian law there is no such restriction. At any time a promise may be given for an act done in the past.

RULE X.—Mutual promises are binding.

There is a system of jointure on the marriage taking place; any promise by some third person to give property on condition of marriage taking place, between the intended parties, will be enforced.

RULE XI.—There is no instrument in the nature of a deed and value is required in the deed for its validity.

The public books (*tabulæ*) are very much like deeds. The *instrumentum* is written in a particular way prescribed by the law concerning the legal act, on the ground of which the immoveable property is transmitted,

The technical rules of English law about deeds are not to be found in Austrian law.

B.—THE DOCTRINE IN THE LAW OF PROPERTY AND CONVEYANCING.

RULE I.—The presence or absence of value affects the legal nature of the transaction.

Gifts, when the present is not completed by delivery, must take the form of an act by a notary according to the law¹.

There is no idea of trust in Austrian law in the English sense of that term. The ownership is legal only.

RULE II.—Conveyances can be set aside on various grounds.

In case of gifts the donor can set aside the gift : (a) if he falls into indigence and requires it for his own support : (b) if the donee is ungrateful towards the donor ; (c) if the donor has descendants and their legitimate portion in prejudiced by the gift, the descendants can demand the portion from the donee to the extent of that share.

In English law these rules are not allowed. Creditors can impeach alienations. According to the law of 16th March, 1894, No. 36², which enacts that creditors can set aside gifts of property, a person who has a claim upon the donor can set aside alienations from the third person (receiver of that property) and can claim to complete what ought to be given to him.

In English law, 13 Eliz. c. 5 and 27 Eliz. c. 4 enact that fraudulent transfers will be void, but rights of *bona fide* purchasers for value are protected.

There is no bill of sale as in English law and to create a pledge, delivery of the moveable must be given.

¹25th July, 1871, No. 73, *Austrian Law*. ²*Ibid*, Sec. 950.

C.—OBLIGATION TO DISCLOSE THE NATURE
OF THE GROUND OF THE OBLIGATION.

There are certain forms which must be observed to make a contract binding, besides offer and acceptance. Notarial instruments must contain the value given and the nature of the consideration, if any. For the transmission in the *tabulæ* (the books in which land and houses must be registered), it is necessary to prove the valuable consideration through a formally correct and special letter. This is corresponding to registration in English law.

CHAPTER XVI.

COMPARISON OF THE DOCTRINE IN ENGLISH AND RUSSIAN LAW.

Russian law is not of Roman origin but is made up of decisions given by the Czar of Russia in different cases referred to him ; special *ukazas* (decisions) are made. In the beginning of the 19th century extracts were made and codified by an official department of codification. This codified law is known as Russian law. The first codification took place in 1835 ; these laws were systematised in 150 volumes¹. Civil law is contained in Vol. 10, Part I ; Commercial law in Vol. 11, Part I ; the Law of Bankruptcy in Vol. 11, Part II.

In Russian law neither consideration in the English sense nor *causa* in the Roman sense is essential for the validity of a contract.

To make an agreement binding Russian law requires : (1) consent of the parties to the contract ; and (2) the object of the agreement must not be immoral or opposed to public policy.

There are four kinds of contract :

- (1) Oral contracts which must be proved by witnesses.

¹*Civil Code of Russia*, by Lahr ; *General Theory of Russian Law*, by Korkoumou ; *Russian History*, by Kluckewsky. The Charters of Pskov and Novgorod contain law proceedings. *Journal of the Ministry of National Education*, in 1895, "The Collection and Code of Laws of the Russian Empire" ; *History of Russian Law*, by Sergejevitch and Vladmirski Buda-

nov of Kiev. A comparison of the social and economic life of Russia with that of France, Germany and England. *Lectures on Slavonic Law*, by Feodor Sigel, 1902 ; Lecture IV, "Russia" being the Ilchester Lectures for 1900 ; The juridical works of Russakaya Pravda ; The Pravda of the sons of Jaroslav.

- (2) Written contracts which must be signed by the parties.
- (3) Written contracts with signature of the notary public¹.
- (4) Contracts which are required to be made by a notary public and confirmed by another notary public. This is applicable to contracts relating to real property.

A.—RULES OF THE DOCTRINE IN THE LAW OF CONTRACT.

RULE I.—A contract is completed by consent of the contracting parties. Offer and acceptance make the contract binding.

There is no Doctrine of Consideration in Russian law; nor does the Russian law require the presence of *causa* as in Roman law.

The law of bills of exchange and promissory notes has been based on the German system. A bill is regarded as an instrument of credit. (Draft Code of Russia.)

RULE II.—It is not necessary that the promisor should derive any benefit from the promise or that the promisee should suffer any detriment or loss by acting on the promise.

In English law there must be detriment of a legal right from the promise of the other party.

RULE III.—A third party may derive the benefit of a promise between two contracting parties if he knows and accepts that promise.

In English law no stranger to the contract can enforce the promise.

¹These have special preference.

RULE IV.—The promise to give or do something for another need not be for adequate value.

English and Russian law do not require that there be adequacy of value for the promise. It is enough if they are of some value in the eye of the law.

RULE V.—The object of the promise must be definite and lawful.

Bets and wagers are illegal and debts incurred for paying gambling debts cannot be recovered.

This is also the rule of English law.

RULE VI.—Any motive to return a benefit received in the past will be a valid reason to make the promise binding. The fact of giving a promise creates a moral obligation to perform it.

This is not so in English law.

RULE VII.—If one party to a contract agrees to abandon his right or to forbear from pursuing his claim, it is a valid promise and the original claim or right cannot be enforced. A smaller sum can be accepted in discharge of a debt for a larger sum.

This is also the rule of English law ; the peculiar rule in *Cumber v. Wane*¹ is not accepted in Russian law.

RULE VIII.—Compromise of a doubtful claim is valid.

Creditors can enter into composition with their debtors.

This is also the rule of English law.

RULE IX.—Moral consideration creates an obligation to perform the promise.

In English law a subsequent promise cannot generally be regarded as capable of creating an obligation for an antecedent promise.

¹ S. L. C., 336-355.

RULE X.—Promise of marriage is called betrothal, and is concluded as soon as two families have come to agreement : (1) as to the amount of marriage expenses each family is to bear ; (2) as to the time when marriage is to be celebrated. Betrothal takes place when the intending spouses shake hands.

If the betrothal is broken, pecuniary compensation must be paid. The wife's property is quite separate. There is no marriage settlement in the English sense of the term.

RULE XI.—There is no contract under seal.

There is no need for a seal, because when an instrument is drawn up and signed by the parties, it is required to be confirmed by a chief notary.

There is no instrument in the nature of a deed in the English sense of the term. Every instrument must be the outcome of consent between the parties to it.

B.—DOCTRINE IN THE LAW OF PROPERTY AND CONVEYANCING.

RULE I.—The presence or absence of value changes
• the legal nature of the transaction.

A gift is completed by offer and acceptance followed by delivery of the property.

If the gift is of land, it must be made before a notary.

In the case of sale of moveable property, it must be effected by delivery. The contract is completed by fixing the price and the delivery of the price on the one hand and of the property on the other.

There is a notarial system peculiar to Russian law. Every transfer of landed property must be made before a public notary.

There is no bill of sale in Russian law ; there is no difference between the law of mortgage and the pledge of immoveable and moveable property. Delivery must be given in each case.

There is no law of trust and legal ownership is known
There is no equitable estate known in Russian law.

RULE II.—Alienations of property can be set aside for want of value on several grounds.

All gifts which a merchant makes within ten years previous to his insolvency will be set aside by the creditors. It does not matter to whom the alienation is made. The Bankruptcy Statute enacts that all the property of the debtor which is in his actual possession, and what he has during the last ten years mortgaged or transferred, without receiving consideration or compensation, when the debts of the bankrupt are more than half, the amount of the property can be claimed by the creditors.

Bankruptcy is of two kinds : (1) ordinary ; (2) commercial.¹

In English law the Bankruptcy Act renders void alienations of property if they are *mala fide* or without consideration. *Bona fide* purchasers are protected. The Russian law is strict and sets aside all transfers *bona fide* or not. Future creditors and existing creditors have an equal right to impeach transfers. Merchants cannot make any gift if they are insolvent. Even alienation made in pursuance of agreement to give or settle property cannot stand.

C.—OBLIGATION TO DISCLOSE THE NATURE OF CONSIDERATION OR VALUE.

I.—All transactions relating to land must be made before a notary public who keeps a register of such transactions. He also inserts the title and consideration of value paid.

II.—Negotiable instruments are to be in writing, setting out the value received.

¹*Bankruptcy Statute, Secs. 553-554.*

CHAPTER XVII.

COMPARISON OF THE DOCTRINE IN ENGLISH AND CHINESE LAW.

The law of China¹ is based on the customs of the family, which is the unit of society. The Emperor was formerly regarded as the head of the Government. Li Kwei codified the law of China about two thousand years ago, in forty-eight volumes. In 1647 a code was issued; it was translated into English by Sir George Thomas Staunton in 1810. That code is based on the Chinese classics. The main idea of the Chinese system of law is penal, and for every violation of law, corporeal punishment is prescribed. The doctrine of mutual responsibility is the central point in the entire system of Chinese jurisprudence. This doctrine of responsibility is quite foreign to any other legal system. The whole system of law is based on filial duty. It was first stated by Tao². Status is everything, contract nothing.

When any dealing is made, there is a family council to whom it must be referred, otherwise it will not affect property at all.

¹*Penal Code of China*, by Sir G. T. Staunton, 1810; Capt. F. Brinkley, *History of Japan and China; The Civilisation of China*, by Prof. H. A. Giles; *China*, by E. H. Harper; *China under the Empress Dowager*, by J. O. Bland and E. Backhouse; *Chuang Tzu*, by H. A. Giles; *Chinese Jurisprudence*, by His Excellency Wu Ting Fang, LL.D.; *American Law Review*, 1901, Vol. XXXV; an address delivered before New

York State Bar Association, Jan. 15, 1901. The standard work is called *Ta Ching Luli*, known as the Penal Code, first ed. published in 1647; Curzon, *Problems of the Far East*, 1896; De Halde *Pe General Hist. of China*, done from the French of H. Pdu, by J. Brookes (1736), 4 Vols. *Translations of the Peking Gazette*, 1872.

²*Sacred Books of the East*. Vol. 28, Parts I, II.

Mercantile transactions, writes Captain F. Brinkley, are very unstable, owing to the defect in currency which consists of pure silver (several touches) and copper cash (several qualities), and the relation between them varies every day.

In China decided cases are binding. Every disposition must be under the seal of Ti-pao, who is the official of the State.

In China foreign nations are governed by their own laws. China and the United States have a treaty regulating the system of law to be applied to foreigners residing in China. Great Britain made a similar treaty with China in 1858.

The Supreme Court at Shanghai is established, with a special code of rules, by British Government. There is a mixed court at Shanghai established by the Chinese Government. A British subject must be tried by British law before a British tribunal.

In Shanghai Chinese law prevails. Chinese law is made up of customary law, or the principles of good conscience, interpreted by a non-official judge with the assistance of a staff of clerks who are acquainted with the practice of the court. The law of China now prevailing is based on the great Code of the Chinese Dynasty. The law is an authoritative statement of old practices founded on ethics.

There is no Doctrine of Consideration, as in English law, nor Doctrine of Cause, as in French law.

A.—RULES OF THE DOCTRINE IN THE LAW OF CONTRACT.

RULE I.—Contract is formed by consensus of the parties and it is not necessary that it be a bargain of pecuniary character.

In English law every simple contract must have valuable consideration. It is not required in Chinese

¹Dated 1858-60.

law at all. All that the law requires is free and voluntary consent for a lawful object.

In China a peculiar system of banking prevails. Wong Kai Kali writes : " A bank can be established in China without any special permission from the State. Bank notes and promissory notes are issued by leading bankers in the city. These notes are *not legal tender* but are accepted on good business faith. The Chinese banks in Hong Kong, Shanghai, Tientsin and other places require real securities in preference to personal securities. Modern currency in China is silver with *tael* as the unit of weight. A dollar is quoted in terms of *tael*." ¹

RULE II.—It is quite immaterial that the promisor should derive any profit from the promise : or that the promisee should suffer any legal detriment by acting on the promise.

In English law there must be some legal detriment suffered by the promisee by relying on the promise of the promisor.

RULE III.—The promise need not move from the promisee so long as the promisor is agreed that a specific person is to have the benefit of that promise.

In English law no stranger to the contract can enforce the promise ; not so in Chinese law ; the benefit of the contract can be transferred to a third person named in the contract.

RULE IV.—The act or forbearance which is the object of the contract need not be of any pecuniary value.

In English and in Chinese law inadequacy of value is not *per se* a ground to set aside a contract. But if there be deception or fraud, inadequacy may be inquired into to find out if the parties have really agreed or not.

¹ *Chinese Currency and Banking*, p. 41.

RULE V.—A contract for an illegal or immoral object is void.

In Chinese law monopoly of trade is unlawful. It is enacted that fictitious buying or selling is illegal and any contract in such dealing is void. Mercantile contracts which are opposed to the general weal are void. Fictitious buying and selling is illegal. Combinations to raise or depress prices and to receive undue profit therefrom are illegal. Speculating in future prices is regarded as a wager and is void.

Whoever agrees to lend money or other property of value in order to derive a profit from such transaction is limited to the receipt of interest on the amount or value of the loan at the rate of 3 per cent per month; the excess cannot be demanded. In other words, usurious contracts are illegal.

The distinction between void and illegal transactions is not to be found in Chinese law. All agreements which are forbidden are illegal.

RULE VI.—Any motive to return a benefit received will support a promise.

In English law motive is not the same thing as consideration moving from the plaintiff.

RULE VII.—Forbearance to exercise a right is a valid reason for the promise.

RULE VIII.—Compromise of a disputed right is valid. The English and Chinese law is similar in this respect.

RULE IX.—Moral consideration creates an obligation to perform the promise for something done in the past.

In English law as a general rule moral consideration is no consideration at all. There must be both legal and moral obligation to make the promise binding.

RULE X.—A promise to marry is distinct from marriage.

If the family of the intended bride should repent after having entered the contract and refuse to carry

out the contract, the person amongst them who has authority to give her away is punished and the marriage is completed in accordance with the contract. The marriage contract need not be reduced to writing. Presents received are evidence of a contract having been made. The respective families are responsible and a penalty attaches to them and the negotiators. All the property of the wife, however inherited or acquired, belongs to the husband. The parties to the marriage are not consenting parties at all.

RULE XI.—There is no instrument in the nature of a deed, every contract or instrument is valid by the force of the consent of the parties to it.

A contract is binding or specific performance can be claimed.

In Chinese law the decree is not enforced by seizure and sale of the property of the debtor, but a warrant is issued to put the debtor in prison till he performs the contract.

In English law specific performance will not be granted, if consideration is not paid.

There is no deed in Chinese law corresponding to the deed in English law. But certain transactions are required to be in writing and signed and sealed by the village elder before they can be registered.

B.—THE DOCTRINE AS IT AFFECTS THE LAW OF PROPERTY.

RULE I.—The presence or absence of value changes the legal nature of the transaction.

A gift cannot be set aside when the transaction is completed by delivery. If the donor has still got possession, the gift is incomplete.

There is no idea of trust in Chinese law in the English sense of the term. If the transaction as a contract is good, it will be treated as a contract. Real property must be registered in the public records of government,

In matters of the sale and mortgage of land the purchaser or mortgagee has to enter into contract duly authenticated and assessed with legal duty by a proper official of the court. There are deeds in different provinces. Those deeds contain technical words. The subject-matter of agreement must be clearly set out: the legal terms must be used. In every deed of conveyance a clause occurs to the effect that the seller was in want of money and having first offered the land to his kinsmen who declined to buy it, he has arranged to sell it to the purchaser for the price mentioned. After this insertion the instrument is required to be sealed by *Ti-pao*, the headman of the village, before it is registered in the office of the district magistrate. If the deed is not duly registered, the buyer must have it registered to complete his own title.

The British Supreme Court of Shanghai has recognised the system of tenure prevailing in China; and land in China has peculiar qualification impressed upon it by the Chinese law.

The method of transferring land is by deed-poll made by the seller and subscribed by him and the middleman. This does not mean a deed in the English sense of the term. It is usual for the seller and middleman to affix their marks and not their seals, to avoid question of identity, and the signature of two witnesses is required to attest it. All it means is that the parties have duly considered the matter.

In Chinese law the right of redemption is recognised in every mortgage and must be exercised within 30 years.

The form relating to title-deeds was first prescribed for the whole Empire of China in 1783 A.D., and that form is in use to-day. The words 'absolute sale without power of redemption' are to be inserted in every instrument of sale; otherwise the property can be redeemed within 30 years. There is a custom of bargain-money requiring a certain percentage of the amount of the

capital to be paid when the bargain is struck. The handing over of the bargain money completes the transaction. Earnest, or God's penny, in English law is similar to this idea. The method of keeping and using chops was discussed in *You Foo Chee v. Evans & Co.*, decided in 1901.

Chinese firms use two kinds of chops : (1) To stamp chit books and receipts ; (2) to make contracts and formal documents. The signature of the other person to the bargain should be affixed. The *Ti-pao*, the officer, affixes his chop to the instrument. In order to make a bill of sale and leases valid, the chop of the *Ti-pao* is absolutely required. The object is to prevent fraud on the part of the owner of the land. The bill of sale is signed by the vendor and the middleman before the *Ti-pao* and the money is handed to the borrower. In *David Sasoon, Sons & Co. v. Wong Gan Jing*, the British Court at Shanghai discussed the use of the chops in a transaction as giving rise to legal liability.

RULE II.—Conveyance, though valid, between the contracting parties can be set aside for want of value.

Fraudulent transfers will be set aside. The innocent purchaser is not protected if the transfer was in fact fraudulent. This is not so in English law ; a *bona fide* purchaser for value is protected. Creditors have a right to impeach fraudulent transfers.

If property sold was stolen, it must be restored as soon as the criminal is punished. In English law no property can pass through theft, except in market overt.

The bankruptcy system in China is very crude. The creditor can put the debtor in prison till he pays the debt or a compromise is arrived at. The creditor can *sit dharma*, that is, he goes and sits at the door of the debtor's house till the debt is paid ; if the creditor dies, the debtor will be strangled for the murder of his creditor.

C—OBLIGATION TO DISCLOSE THE
NATURE OF VALUE.

I.—In Chinese law transactions relating to land are to be reduced to writing before the village-elder and signed and registered setting out the particulars.

II.—Pawnbrokers are required to reduce transactions relating to pledges to writing.

III.—There is no instrument corresponding to English Bill of Sale because the pledge of goods must be made by delivery.

CHAPTER XVIII.

COMPARISON OF THE DOCTRINE IN ENGLISH AND BABYLONIAN LAW.

In Babylonia¹ and Assyria the tablets that have been found contain records of a civilisation of a very advanced type and a system of law much perfected.

In Babylonia and Assyria business was done by deed or bond before witnesses, not only when the transaction took place between strangers but between members of the same family. The Code of Hammurabi enacted that if a man bought silver or gold, man-servant or maid-servant, ox or sheep from the son of a man-servant of a man or received it on deposit without witness or contract, he was a thief and should be put to death.

¹Goodspeed, *Hist. of Baby-
lonians and Assyrians*, 1903 ;
Hist. of the Ancient World,
1905 ; Maspero, *Dawn of
Civilisation*, 1896 ; *Passing
of Empires*, 1900 ; Rawlinson,
*The Five Great Monarchies of
the Ancient Eastern World*,
1871, 2nd ed, 3 vols. ; *Ameri-
can Journal of Semitic Lan-
guages and Literatures* (Chi-
cago) ; *The Oldest Code of
Laws in the World*, by Ham-
murabi (B.C. 2285-2244), tr.
by C. H. W. Jones, 1903 ;
*World's Great Books, Assyrian
and Babylonian Literature*,
Code of Hammurabi, by Har-
per, trans. ; Hastings, *Bibli-
cal Dictionary*, extra vol.,
1934, arts. "Babylonia" and
"Code of Hammurabi" ;
Law of Moses and Code of

Hammurabi, by S. A. Cook,
1903 ; *Babylonian and Assy-
rian Laws, Contracts and
Letters*, by C. H. Johns, 1904
(Library of Ancient Inscrip-
tions) *Assyrian Deeds and
Documents Relating to Trans-
fer of Property*, by C. H.
Johns, 1898 ; "Assyrian Pri-
vate Contracts," *Journal of
Royal Asiatic Society*, No.
1898, pp. 893-97, by T. C.
Pinches. British Museum,
Babylonian Contract Tablets.
In the British Museum there
are a number of 'Case'
Tablets from Tell Sifr,
(Loftus), relating to Con-
tracts. *The Letters and Ins-
criptions of Hammurabi*,
by L. W. King, London,
1898, 3 vols.

Babylonia was a great centre of commerce and agriculture. The system of credit was known to the people. Tablets of moist clay contained the record of legal transactions. The witnesses affixed their seals if they could not write.

The contract tablets contain an account of the contract law of Babylonia. Asurbanipal, a King of Babylon, made a collection of such transactions.

Babylonian law resembles English law in being founded upon precedents. The code which was supposed to have been revealed by Ra or Oannes belonged to the infancy of Chaldean society and was very rudimentary. The actual law of the country, writes Prof. Sayce, was built up by later generations. An abstract was made of every important case that came before the judges and of the decision given. These abstracts were carefully preserved and formed the basis of future judgments¹. There is no Doctrine of Consideration in the English sense of the term. The agreement was binding by offer and acceptance before witnesses in a public place. There must be a writing in which the terms of the agreement were embodied. In English law there must be valuable consideration in a written contract. In Babylonia there was no document in the nature of deed in the English sense. But the notarial instruments were given great importance from the fact of their being made before priests in temples.

The account of Babylon given by Herodotus is very meagre and untrustworthy. Ptolemy, Eusebius and Syncellus and the Old Testament are the main sources of the historical account of Chaldea. Various expeditions have been sent to excavate the Babylonian and Assyrian tablets and by the help of the cuneiform system of writing it has been possible to learn the legal system of Babylonia. The British Museum contains many tablets throwing much light on the legal doctrine.

¹*Babylonians and Assyrians*, Ch. IX, Laws.

A number of contract-tablets date from the reign of Hammurabi and other kings of the dynasty. A code of law was compiled during this dynasty by order of Hammurabi, about 2250 B. C. A copy of that code has been found at Susa, by J. De Morgan, and is preserved in the Louvre.

A.—RULE OF THE DOCTRINE IN THE LAW OF CONTRACTS.

There is no Doctrine of Consideration in Babylonian law, but the great peculiarity is the system of documentary evidence in all transactions. Written contracts were in use. Priests exercised notarial and judicial powers. Contractual oaths played a great part. The parties affixed their seals to such contracts; witnesses were required to sign their names with the date of the contract before an official who also signed; the document was filed in the public archives. Contracts were reproduced in duplicate. Ihering says, the system of duplicating documents was well known¹.

The idea of contract was fully formed in the law of Babylon. Any business transaction was reduced to the form of contract and executed before witnesses and a notary, and was required to be signed. All deeds of sales, loans, etc., were treated as contract².

Banking is distinct from the loan of money. A banker was entrusted with money. There are tablets showing banking transactions.

Payment to a third party was made by a draft upon a banker whereby he was instructed to pay the amount of the draft from the money deposited to the drawer's credit. Every kind of commercial paper passed like a bank note from hand to hand. Meisner gives an example of bank notes³.

¹*Evolution of the Assyrians*, p. 206;

²Code of Hammurabi

³*Op. cit.* p. 21.

Marriage was a civil contract of purchase. Meisner gives a contract of marriage in which provision was made for quit money to be paid in the event of divorce¹.

If a man has taken a wife and has not executed a marriage contract, that woman is not his wife².

A contract was not valid unless it was sealed and witnessed. The sealing was accompanied by an oath. The oath, writes Johns, had probably to be taken in a sacred place. The witnesses were a body of men who could be found in the courts of a sacred place like a temple.

B.—RULES IN LAW OF PROPERTY AND CONVEYANCING.

Deeds of gifts were duly executed, sealed and witnessed, and the consent of the parties whose expectations were diminished or restricted had to be obtained³. A document of gift was as follows: the household which Bol-naid gave to his daughter Baltoaabate, a house in Nineveh before the great Gate of the Temple of Shamosh (then come the servants, male and female, in all eleven in number, date, etc.).

Sale

A change of ownership in case of land or house must be made by a deed of sale. When the object of sale was anything—land or house or slave, the same general treatment was given. After the formalities were gone through, the terms were reduced to writing. The copy of the deed was kept in the temple archives as registration of title. Each party used his own seal and witnesses used their own seals. The nature of the transaction was made clear by using the words sold, money paid in full to prevent withdrawal from the contract⁴. The form of conveyance was used to describe land minutely and it was drawn after great ceremonies. As a general rule the purchaser could not get a permanent title because

¹ Code of Hammurabi, p. 71.

² Johns, Ch. 21.

³ Johns, Code of Hammurabi, sec. 128.

⁴ Johns, Ch. 22.

the owner was entitled to pay back the money with a fine, and even if the property had changed hands the owner could reclaim it. Hence in deeds a clause was added that property could not be redeemed. Later Assyrian deeds contain a clause that on paying 10 per cent. of the price the property can be reclaimed¹. "He shall return with the tenth of the price to the owner. Then he will be rid of his contract. He has not sold."

In order to make a valid pledge it was not necessary to give possession of the thing to the pledgee. The transaction was made in the presence of witnesses before a public place. This resembles the modern Bill of Sale.

There was no idea of trust in the English sense of the term, ownership was legal only.

In commercial matters payment was made in kind, but the parties usually contracted for cash.

Marriage settlement was recognised in Babylonian law. Prof. Sayce writes: "One of the documents that has come down to us records the gift of a female slave by a husband to his wife. The right of the woman to hold private property of her own over which the male heirs had no control was early recognised by law. In later times it is referred to in numberless contracts²." Maitland says: Assyrian women enjoyed almost as many privileges as the Babylonian married women. The Married Woman's Property Act was anticipated in 500 B.C. and earlier. The individual, not the family, is the unit of society in the Babylonian Empire. Drs Oppert and Sayce agree with this view.

Dr. Oppert writes: "The first texts which I have selected contain contracts and legal decisions."

Contract tablets were collected between 551-544 B.C.

¹*Records of the Past*, Series 1, Vol. VII, p. 105.

²*Babylonians and Assyrians*, p. 327.

C.—OBLIGATION TO DISCLOSE THE NATURE
OF THE GROUND OF THE OBLIGATION.

The principle of all transactions was to reduce them to writing before witnesses and notaries. Duplicate copies were made and one of them was preserved in the public archives.

CHAPTER XIX.

COMPARISON OF THE DOCTRINE OF CONSIDERATION IN ENGLISH, JEWISH AND OTTOMAN LAW.

The law of Israel is contained in the Pentateuch, the Books of Moses, 2, 3, 4. Theocracy is the basis of law. The judges, kings, or priests are acting under the Supreme Ruler and in obedience to his laws and are ministers of God. The Mosaic law¹ was very similar to Babylonian law.

Israel is described as an agricultural and not a commercial nation. The land belonged to God and all Israel were His tenants. There is no elaborate system of law. There is no system of credit. Ordinary transactions were carried out before witnesses and the money was weighed out there and then.

As in theory the land was given to the whole people, it was divided among them. Every fifty years every kind of property that was aliened could be recovered. There was no sale out and out of property.² "In the year of this jubilee ye shall return every man his possession³." Property was inalienable. The bargain was completed before witnesses before the gate of the city.

In later time a document was used for extra security. This deed was sealed and a copy of the deed was given to a scribe in the presence of buyer, seller and witnesses⁴.

The Mosaic law does not encourage trade and bartering as occupations fit for Israelites. Exodus XXI-XXIII, 19, contains the oldest collection of laws in the Old Testament.

¹*The Law of Moses and the Code of Hammurabi*, by S. A. Cook, 1903.

²Lev. XXV. 25.

³Lev. XXV, 10, 13.

⁴Jer. XXXI, 11.

There is no Doctrine of Consideration in Jewish law. There is no system of law distinct from morality. The priest, the judge and law-giver are all one and the same person. The people are living in a very simple and agricultural state of society.

The Doctrine of Consideration of Ewaz in the Ottoman Empire¹.

The principles of Mahomadan Common law as recognised in the Ottoman Empire are collected in a Civil Code which was compiled by a committee of Turkish jurists in 1869. The Code, in interpreting the sacred law in many points, follows the Hanafi school.

Grigsby says that the doctrine which obtains in the Ottoman Empire is purely Mahomadan without admixture from other systems of law. It is based on Koranic precepts. "Let Musalmans abide by their agreements²".

A gift is formed by means of offer and acceptance, like any other contract; delivery is essential to perfect a gift. A promise to give in future is void. A gift can be set aside as a rule; but if it is made to ascendants or descendants of the donor, it cannot be revoked; also anything given during coverture cannot be revoked; also if the donee has given anything in exchange for the gift, it is irrevocable. The law of sale is also based on the Mahomadan law of the Koran. Sale is a contract formed by means of offer and acceptance. It must relate to something in existence (sec. 167). The price must be named at the time of the agreement of the contract (sec. 237). There is no

¹*Ottoman Civil Code*, translated into English by Grigsby; *Destour*, published at Constantinople; *Mejele*, (Ottoman Civil Code) trans. by Grigsby, 1895; and Tyser,

1901; *Ottoman Commercial Code*, by Amaraya; *Ottoman Law Code*, by Ongley.

²Tit. I., Ch. 4, Art. 197, 205.

Doctrine of Consideration or Cause in the Ottoman Civil Code ; offer and acceptance are alone required to make a promise binding.

The Ottoman civil law consists of: (a) a Civil Code; (b) a Land Code based on Mahomadan law; (c) Commercial law, which includes the law of partnership, bills of exchange, bankruptcy, merchant shipping and marine insurance. This Commercial Code is based on the French Commercial Code.

CHAPTER XX.

SUMMARY.

The study of the Doctrine of Consideration must be summarised with a view to deduce some general conclusions.

The study of English doctrine shows that in its historical development it goes from precedent to precedent; it was fostered by the judges owing to the growing expansion of trade, both in England and her Colonies. It has not been influenced by Roman law at all. It is the direct result of the Common Law of England and is peculiar to it.

In the law of contract the Doctrine of Consideration occupies a very prominent place. There must be some legal detriment to the promisee by acting on the promise of the other party. This is the main idea of the English doctrine. The development of this idea is traced from the study of personal actions.

Carl Guterbock¹ says, "The old English law did not give binding force and legal validity to the mere intention of contracting parties, however it might be expressed. It only protected conventions, and actions were only maintainable upon them when they were either partially performed or were made in solemn form, i.e., by a written charter under seal, *carta*, *sigillata*, *cyrographum*. All other conventions were called *pacta nuda*."

In the legal systems derived from Roman law the requirement of valuable consideration is not essential. But 'cause' is required, in addition to offer and acceptance, to make the promise binding.

¹In *Bracton and his Relation to Roman Law*, trans.

by Brinton Cose, Philadelphia, 1886, pp. 138-139.

Buckland¹ says: "*Causa* means a pre-existing pact giving title and it is used to justify the principles or rather dogma, that in Roman law an action on contract arises from agreement to which is added *causa*. The *causa* is some characteristic of the transaction."

There are systems of law in which the requirement of valuable consideration in the English sense, or of cause in the Roman sense, is not required, offer and acceptance make a contract binding.

A.—THE DOCTRINE IN THE LAW OF CONTRACT.

Rule I.—A simple contract must have valuable consideration; this rule is peculiar to the law of England. In Roman and French law, and in countries which have adopted the rule of French law, besides offer and acceptance cause must be shown. In the legal system of Germany, Japan, Austria, Russia, China, Babylon, Judaism and the Ottoman Empire neither a valuable consideration nor a cause is required to make a contract binding. Negotiable instruments are variously treated in different systems. The English system is based on credit, while the French system is based on the mercantile system. In recent codes the English banking system is adopted in preference to the French mercantile system.

Rule II.—Valuable consideration must consist in some legal detriment to the promisee by relying on the promise of the promisor in English law. There is no such rule in any other system of law. The reason for its place in English law is that a contract is regarded as a bargain and there must be deprivation of a legal right. In English law there is no distinction between civil and commercial law; while several States that have accepted the law of France have a distinct law of commerce, and trade transactions are

¹ *Elementary Principles of* pp. 230 233.
Roman Private Law, 1912,

dealt with in different tribunals and different principles apply to them. In English law one uniform rule is accepted in all transactions. When a contract is under seal valuable consideration is not required.

Rule III.—Consideration must be the act, forbearance or promise of the promisee. This rule is very stringent in English law ; no stranger to the consideration can enforce a contract. This rule is generally accepted in different countries but there are exceptions which seem to be arbitrary and unscientific. English law has a system of trust, so that a third person can enforce the contract if there is a trust declared in his favour. In British India this rule is codified and it is enacted that when at the desire of the promisor, the promisee or any other person has done or abstained from doing such act or abstinence or promise, is called a consideration. In several codes instances are given where a third party who is not privy to the contract can enforce it. But there is no single principle as in Anglo-Indian law. This rule is also adopted in several States of the United States of America. In Roman law the requirement of solemnity restricted the operation of the contract to those persons who could take part in the ceremony. How far and under what circumstances the act of another person can acquire obligations for us or put us under obligation to a third person is discussed in Buckland's *Elementary Principles of Roman Private Law* (secs. 140-143). This English rule is the survival of the theory of *assumpsit*, showing that as the party had not undertaken an obligation, he must not get the benefit.

Rule IV.—An act or forbearance constituting a valuable consideration must be of some legal value ; it need not be adequate.

By a constitution of the Emperors Diocletian and Maximilian, the right of rescission for inadequacy of value was introduced¹. Justinian adopted their

¹Troplong De la Vente, sec. 780.

constitution. It fixed an arbitrary standard of half the real price as that which would give the injured person a right to claim rescission of the contract¹. The old French Code had accepted the same principles². The present French law is embodied in Art. 1674 of Code Civil, Troplong De la Vente, sec 787.

Other codes that are based on French law have adopted the rule with slight changes. English law has not accepted this rule at all³.

The English rule has the advantage of giving free scope to the intention of the parties: and if there is fraud or deceit the inadequacy of consideration will be a ground to determine that the parties never agreed.

This English rule is now engrafted on the legal systems of the possessions of Great Britain and recent codes have adopted the English rule.

Rule V.—The thing promised at the time of the agreement must be lawful, definite and possible.

In this respect all the systems considered are agreed and the heads of legality are very similar. Wagering contracts are governed generally in accordance with the English rule.

Rule VI.—A valuable consideration does not consist in a mere motive to return a benefit already rendered in English law.

In no other system is this rule adopted. It is peculiar to English law. The reason is very technical and it seems quite inconsistent with the advanced views of modern law.

Rule VII.—Forbearance to exercise a *bona fide* claim is a valuable consideration.

This is acceptable to other systems also.

¹*Cod. lit.* IV. Tit. 44. 2.

(trans. by Evans).

²Pothier, *Obligations*, Part I, Ch. 1, sec. 1, Art. 3.

³Fry, *Specific Performance*, 5th ed., sec. 447.

Rule VIII.—A compromise of an honest dispute is a valuable consideration in English law.

All other systems are agreed on this rule.

Rule IX.—As a general rule past consideration will not support a promise in English law.

This rule is peculiar to the law of England and is not accepted in other legal systems. Moral consideration must be such as to give rise to a legal obligation to pay. This is the most recent interpretation put on the rule. It is very narrow and based on very unsatisfactory grounds. In Anglo-Indian law it is enacted that 'when at the desire of the promisor, the promisee or any other person *has done or abstained from doing* such act, or abstinence, or promise is called a consideration for the promise¹.'

Rule X.—A promise given by an engaged couple, or a third party, in consideration of marriage taking place is valuable consideration. In English law there have been different opinions on this rule. In other systems such a promise is legally binding.

Rule XI.—Some contracts under seal require consideration for their validity.

In English law contracts are divided into simple and those under seal. In other systems of law there is no instrument in the nature of a deed. In the laws of China and Babylon there are documents which require the use of chops and seals. They are very much like the deeds of English law. In Roman law the use of seals was confined to testamentary documents. The use of a seal is derived from Frankish kings.

B.—THE DOCTRINE IN THE LAW OF PROPERTY AND CONVEYANCING.

Rule I.—In English law the presence or absence of valuable consideration changes the legal character of the transaction. This rule is accepted in other

¹ Anglo-Indian Codes, Indian Contract Act IX, of 1872, Sec 2 (d).

systems of law. The gift of property is treated as a contract in the legal systems based on Roman law. The grounds for the revocation of gift are various in the systems based on Roman law. Such grounds do not exist in English law.

Buckland writes: "We shall not find the trust as a general institution in Roman law; of this conception it is common knowledge that the Roman law and systems derived from it possess no parallel. As Maitland has said, the analogy between English double ownership, so called, and the Roman cannot be pushed below the surface. There is nothing fiduciary about the Roman notion¹."

There is no idea of trust in any legal system except that of England. This idea is the real basis of equitable and legal ownership of property in English law. An imperfect gift cannot be treated as a trust.

Rule II.—A conveyance, though valid, can be set aside for want of consideration in English law. In other legal systems provision is made to safeguard the rights of creditors, and dispositions of property made with a view to defraud them can be impeached; and creditors have the right to claim the property back from the alienee.

Buckland² writes: "Pledge is merely the right to take certain procedural steps (D. 9. 4. 27 pr.). There is no text which calls pledge or hypothec a *res*. It is not like a Bill of Sale which transfers ownership. On the other hand an ordinary special hypothec corresponds closely to an equitable lien. Roman law adhered to the rule that transfer of *jus in rem* needed transfer of physical possession."

Bills of Sale are common in English law but there are some systems in which for the validity of a pledge possession must be delivered, and such instruments do not exist.

¹*Equity in Roman Law*, of London Press.
pp. 15-20, 1911, University

²*Ibid* pp. 66-67.

C.—THE DUTY OF DISCLOSING THE NATURE OF CONSIDERATION.

In this respect other legal systems have similar provisions. The Statute of Frauds is enacted in British Possessions and in American States, while the French, Italian and Argentine Codes have made similar arrangements.

In the systems of Germany and Japan it is enacted that certain agreements must be reduced to writing, setting forth the nature of the consideration or value.

Thus the comparative study of the doctrine shows that there are primary rules which are to be found in several legal systems of the world, while there are secondary rules which are peculiar to one country alone. There is homogeneity in the doctrine and the differences are not very great because, in practice, English law and the other legal systems try to find out the real intention of the parties and in doing so adopt something of a common standard.

English law has an external principle for judging the validity of agreement by reference to the legal detriment, while other legal systems, especially that of Germany, apply an internal standard to determine the real intention of the parties. One looks to the outward result and tries to determine the intention of the parties; because a man is presumed to know the natural and probable consequences of his act; while the other legal systems try to get at the intention of the parties without having recourse to the outward effect. To effect that end those systems lay very great stress on the modes of proof.

To conclude with the dictum of Lord Macaulay: "Legislators should aim at uniformity when they *can* have it; diversity when they *must* have it; but in all cases *certainly*."

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